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Human Rights Committee
Ninety-second session

Summary record of the 2512th meeting
Held at Headquarters, New York, on Monday, 17 March 2008, at 3 p.m.

Chairperson: Mr. Rivas Posada

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Fifth periodic report of Tunisia

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Any corrections to the record of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-27240 (E)

The meeting was called to order at 3.05 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant

Fifth periodic report of Tunisia (CCPR/C/TUN and CCPR/C/TUN/Q/5)

1. At the invitation of the Chairperson, the members of the delegation of Tunisia took places at the Committee table.

2. **Mr. Amor**, recused himself under rule 71, paragraph 4, of the rules of procedure of the Human Rights Committee.

3. **Mr. Tekkari** (Tunisia) said that his Government's report spanned a ten-year period and summed up the human rights situation in Tunisia at a time of rapid reforms intended to advance the country's modernization agenda. The reforms introduced covered issues such as the rule of law; the consolidation of rights and freedoms and of the system of justice; the promotion of a human rights culture; and commitment to cooperation with United Nations and regional human rights mechanisms. While considerable progress had been made with respect to the promotion and protection of human rights, much work remained to be done. The recent measures taken by his Government to give fresh impetus to its efforts in that area included the decisions to welcome Special Rapporteurs from both the Human Rights Council and the African Commission on Human and Peoples' Rights and to present eight periodic reports in 2008, concerning the implementation of various human rights conventions to the relevant United Nations bodies; the strengthening of the Tunisian High Committee on Human Rights and Fundamental Freedoms by conferring legislative status on it and giving it broad powers to combat human rights abuses; the withdrawal of Tunisia's reservations to the Convention on the Rights of the Child; and Tunisia's accession to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Tunisia also adopted the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, and it would continue to commute death sentences to life imprisonment terms. Other measures included welcoming Human Rights Watch to visit Tunisian prisons and establishing an authority to follow up on the implementation of recommendations made by treaty monitoring bodies.

4. There had been considerable changes in the political scene over the previous two decades, with nine political parties contributing to national intellectual and political debates on the country's future. Six of the parties were active in the Chamber of Deputies, representing opposing viewpoints. Furthermore, a new election system had recently introduced that guaranteed opposition parties at least 25 per cent of seats in the Government at the national, regional and local levels. With regard to the status of women, Tunisia had demonstrated the political will and taken steps to enable women to participate, on an equal footing with men, in all aspects of public, economic and social life. Tunisia interpreted Islamic sharia law in the context of its reformist approach, aimed at protecting human rights in general and women's rights in particular. Protection of children and the family were also among his Government's priorities, as demonstrated by the amendments to the Family Code and the establishment of a code on the protection of children.

5. The progress achieved required further consolidation, given the challenges posed by terrorism, religious enmity and the distressing discourse of certain satellite television networks that incited hatred of others and sometimes justified extremism. Terrorist acts had been perpetrated in Tunisia by foreign and national agents, among them the North African wing of the Al-Qaida organization. Such extremism portrayed a distorted image of religion and threatened the gains of modernity and democracy; according to one extremist leader, in Islam democracy was tantamount to apostasy. Furthermore, some 500 foreign television networks in the region tried to indoctrinate Tunisian youth with their simplistic and demagogic discourse.

6. The adverse effects of globalization also posed a threat to economic and social rights, which were interdependent and indissociable from all other human rights. His Government was committed to continue protecting and promoting human rights while also addressing a number of other challenges. He expressed the hope that his delegation would have a constructive dialogue with the Committee.

7. **The Chairperson** invited the delegation to address the questions on the list of issues (CCPR/C/TUN/Q/5).

8. **Mr. Labidi** (Tunisia) said, with reference to question 1 on the list of issues, that once a treaty

entered into force, it became part of the national legal system and a binding higher source of law. Tunisia's ordinary and administrative courts had decided to allow litigants to directly invoke international human rights and other legal instruments in several cases. For example, in 2000, the Tunis court of first instance had rejected an application to enforce an Egyptian act of repudiation on the grounds that it contradicted Tunisian public policy as derived from article 6 of the Constitution, articles 1, 2, 7 and 16, paragraphs 1 and 2, of the Universal Declaration of Human Rights, and articles 1, 2 and 16 (c) of the Convention on the Elimination of All Forms of Discrimination against Women. There had also been several instances in which courts had, in their rulings, cited international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. In one such case dating back to 2003, a court of first instance, ruling on an action brought by the Public Prosecutor's Office to establish a child's filiation after paternity had been proved by DNA testing, had found that filiation as defined in article 68 of the Tunisian Personal Status Code must be interpreted broadly in accordance with article 2, paragraph 2, of the Convention on the Rights of the Child.

9. In 1999, the Administrative Tribunal, relying on article 23 of the Covenant, had reversed the administrative authorities' decision to dismiss an official of the internal security forces because he had failed to obtain prior authorization for marriage to a foreign woman. In a 2006 opinion, the Constitutional Council had pointed out that the Convention on the Rights of the Child, to which Tunisia was a party, gave precedence to the child's best interests and laid down the rights and obligations of parents and, where applicable, the extended family.

10. A commission comprising representatives of the relevant ministries was considering the question of Tunisia's accession to the Optional Protocol to the Covenant.

11. **Mr. Al-Ahmadi** (Tunisia), on the issue of whether the High Committee on Human Rights and Fundamental Freedoms was in conformity with the Paris Principles, said that the High Committee was well known in the Arab world. The Government had studied the comments and recommendations of United Nations human rights bodies and a recently introduced bill, if adopted, would bring the High Committee into line with the Paris Principles. In accordance with paragraph 2 of the Principles, the bill would make the High Committee financially independent, stipulate that it had moral and legal personality, expand its mandate and set forth its composition and functions. It would be able to make recommendations to the President of the Republic, to intervene of its own volition where it considered that a human rights violation had occurred, to receive and consider complaints of such violations and to visit prisons without prior authorization in order to assess implementation of the applicable human rights law.

12. The High Committee's membership would consist of officials from the relevant national ministries and members of civil society, including prominent Tunisians representing different philosophical positions, academics and members of non-governmental organizations (NGOs). It would be able to take decisions by consensus or majority vote and would submit annual reports as stipulated in paragraph 3 (a) (iii) of the Paris Principles.

13. Some NGOs had expressed concern that the bill might place the High Committee in competition with other human rights bodies; however, the Government considered that such competition was desirable provided that the national institution cooperated with international bodies as needed.

14. **Mr. Tekkari** (Tunisia), replying to question 3 on the list of issues (CCPR/C/TUN/Q/5), said that 65 per cent of the pending Administrative Tribunal decisions had now been enforced. The remaining cases, which involved delay rather than non-enforcement, fell into two categories: those in which the Tribunal had called for a process — such as recruitment to a post — to be completely redone and those in which the Tribunal had awarded compensation that would be paid under the next year's budget.

15. On the issue of the independence of the judiciary, he explained that the Organization Act of 2005 had made the High Council of the Judiciary more independent. Its membership had been reduced from 35, of whom six were elected, to 18, of whom eight were elected; 30 per cent of its permanent members were women and an additional two women members were appointed to renewable two-year terms, after consultation with the Council as a whole, as an act of positive discrimination. The Council took decisions regarding the appointment, promotion and transfer of

judges, which were then promulgated by executive decree. The President of the Republic, who held the honorary rank of Chief Justice of Tunisia, was titular head of the Council but was not involved in preparing its decisions, which were drafted by a small group of elected members.

16. The tenure of judges, an issue on which the Committee had expressed concern in the past, was enshrined in domestic law but was not absolute; judges were guaranteed at least five years in a post, after which they could be transferred. Without that measure, it would be impossible to meet the need for judges in remote regions of the country that were considered undesirable.

17. Many civil society conflicts that had once been settled amicably or by the national authorities were now brought before the courts and were widely, and sometimes inaccurately, reported; where the court's decision differed from the views expressed by the media, false allegations that the judiciary lacked independence were made.

18. Tunisia had been a victim of terrorist attacks. The definition of terrorism contained in article 4 of Act No. 2003-75 of 10 December 2003 had been criticized as imprecise; however, it was based on the definition contained in the relevant international instruments, particularly the 1999 Convention for the Suppression of the Financing of Terrorism. The Act covered only acts that were already criminalized in the Criminal Code, further defining them as terrorism if they were committed for the purpose of terrorizing a person, a group of persons or a population; it did not cover crimes of opinion. In several cases, examining magistrates and judges had ordered the release of defendants who had organized meetings of a fundamentalist nature but had not engaged in actual preparations for a crime; two such individuals had subsequently perpetrated suicide bombing attacks.

19. The courts had also been criticized for allowing the names of witnesses and police officers to be concealed during court proceedings, but that was done only where an imminent threat was deemed to exist. Accused persons and their counsels could request the court to reveal the identity of the individuals concerned and in cases of abuse, the witness or police officer could be prosecuted.

20. His Government stood ready to improve its domestic law, including in the area of counter-terrorism, but only in response to concrete recommendations based on the relevant United Nations instruments rather than on the legislation of other States; Tunisian law was already in advance of other countries in a number of areas, including that of police custody.

21. **Ms. Ammar** (Tunisia), on the issue of violence against women, said that the Personal Status Code, adopted in 1956, had established the emancipation of women and the equality of all citizens in principle. Efforts were being made to combat traditional attitudes that saw women as inferior, as well as gender-based violence and discrimination in the public and private sectors. Tunisia was in the process of becoming a party to the Additional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Criminal Code prohibited acts of violence against anyone of either sex, with or without premeditation. Women and girls enjoyed legal protection against rape, including by family members.

22. Women victims had full right of recourse and a number of remedies were available to them. Wives were no longer required to obey their husbands; under the amendments to the Personal Status Code adopted in 1993, relations between married couples were based on complementarity and independence and wives had legal personality in their own right.

23. Her Government had developed a plan of action to combat violence against women, and marriage was viewed as an aggravating circumstance that warranted a harsher penalty. Crimes of violence were punishable by one year's imprisonment and a fine of 1,000 dinars; that penalty was doubled if the perpetrator was a descendant or spouse of the victim. Marital rape was a crime under Tunisian law; however, there did not appear to have been any complaints of that crime. Several women's organizations had mounted awareness-raising campaigns and had established listening and counselling centres for women victims of assault. Article 236 of the Criminal Code made adultery by either husbands or wives, without distinction, punishable by law. Penalties could be either pecuniary or custodial, depending on the seriousness of the case and compensation was awarded for bodily injury and for material and non-material damages.

24. **Mr. Tekkari** (Tunisia) said that the Court of Cassation had ruled that all forms of sexual assault

were punishable by law. The Government had no statistics on the number of complaints of domestic violence but would remedy that omission in its next report.

25. **Ms. Gueddana** (Tunisia) said that a major national debate had been held on violence against women. A national commission consisting of representatives of ministries, civil society organizations and the National Office of Family and Population Affairs (ONFP) had drawn up a national plan to combat violence against women. No statistics were yet available, but the commission had recommended conducting a national survey in 2008 on violence against women. Data collection mechanisms were also being reviewed. Many separate pieces of legislation, including the Personal Status Code, the Labour Code and laws on social security, women's work and sexual harassment, contained provisions which could be used as inputs to draft a law against gender violence.

26. The Ministry of the Interior and the Ministry of Public Health had made the reporting of gender violence compulsory for emergency centres and health facilities. The Ministry of Family, Children, Seniors' and Women's Affairs had recommended that priority be given to four areas: data collection; appropriate and diversified services; enhancing community awareness in order to change behaviour and institutions; and advocacy for application of the law. ONFP had already set up national programmes and effectively contributed to the efforts to eliminate violence against women by providing health services to almost 2 million women every year.

27. **Mr. Al-Ahmadi** (Tunisia), referring to question 7 on the list of issues, said that article 58 of the Personal Status Code established the conditions for child custody, including both general and special conditions. The general conditions applied to both sexes, while a special condition applied only to men. A man requesting custody should have a woman available to care for the child, and should also be related to the child to a degree that prohibited marriage. In the case of a woman, she should not be married, although that was not an absolute condition. A mother always had custody in the case of the father being deceased, or if she was breastfeeding her baby. As Tunisian legislators had adopted an approach that was based on the sole criterion of what was best for the child, those conditions were not incompatible with equality. Tunisian case law included an example of custody of a Tunisian child being awarded to a foreign non-Muslim woman who resided outside Tunisia.

28. **Mr. Tekkari** (Tunisia), with regard to question 8 on the list of issues, said that, while Tunisia was a de facto abolitionist State, its position was not static. It recognized that to sentence a person to death and then not carry out the sentence also caused suffering to the condemned person. Tunisia was currently considering the possibility of reducing the cases to which the death penalty applied. A bill on the abolition of capital punishment was currently before Parliament. Indeed, there was clearly a lot of interest in moving towards de jure abolition.

29. **Mr. Rhemakhem** (Tunisia), with regard to question 9 on the list of issues, said that Tunisian law clearly prohibited torture and that Tunisia had been one of the first countries to ratify the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment without reservations. Tunisian law also protected all persons against arbitrary arrest and detention. Referring to the claims of some NGOs that Tunisia had arbitrarily detained human rights defenders or had given insufficient attention to their complaints, he noted that human rights advocates were treated like other citizens. They could bring complaints with a view to prosecution and if there were sufficient grounds to do so, an inquiry would be initiated.

30. Prosecutors had the power to visit detention centres to investigate complaints filed by detained persons. In one case where a human rights defender had allegedly been subjected to arbitrary detention, the person in question had in fact turned out to have been convicted of assaulting a colleague and obstruction of justice. The Committee surely did not expect human rights defenders to be immune from prosecution in such cases. Tunisia would certainly make every effort to implement the Committee's recommendations.

31. **Mr. Tekkari** (Tunisia) added that complaints could be brought before the State prosecutor, who could decide whether they were serious enough to warrant referral to a judge. If the complaints were subsequently found to be unsubstantiated, a charge of defamation could be brought.

32. Prior to a periodic review or a meeting of the Committee, complaints were very often invented in order to increase their number in an attempt to show systematic violation of human rights by the State Party.

The statistics themselves were the evidence. All citizens deserved protection and all were equal before the law.

33. Referring to the issues of living conditions in prisons, he noted that the International Committee of the Red Cross (ICRC) had visited prisons in Tunisia and that prisoners' living conditions had improved as a result of the implementation of ICRC recommendations. The granting of access to prisons through such visits had also helped to change the attitudes of prison officials. It had also prompted the Government to consider entering into agreements with other NGOs. Tunisia had already expressed its willingness to reach an agreement with Human Rights Watch for prison visits from that organization.

34. **Ms. Ammar** (Tunisia), on the issue of complaints of torture or ill-treatment against public officials, said that the Tunisian Government had introduced sophisticated and advanced legislation and mechanisms to put an end to such violations of human rights. Unfortunately, no statistics on complaints were yet available, but in view of the number of suggestions and comments from various United Nations bodies and human rights experts, they would be included in future reports. Some of the complaints had resulted in prosecution. Every person had the right to file complaints with the Attorney-General and the courts had competent personnel who could follow up on such complaints. Some were submitted to an investigative judge or to the criminal, appeal or arbitration courts. All those mechanisms served as guarantees to protect the rights of victims and their effectiveness was shown in the examples of case law cited in the report (CCPR/C/TUN/Q/5). Complaints could also be brought before the High Committee on Human Rights and Fundamental Freedoms and there were also administrative sanctions for public officials who violated human rights. The Ministry of Justice and other ministries responsible for law enforcement were also supporting awareness-raising campaigns in schools and universities and enhancing training for future security and prison officials. Efforts were continually being made to devise new mechanisms to make respect for human rights — by citizens and public officials alike — part of everyday reality in Tunisia.

35. **Mr. Tekkari** (Tunisia) said that human rights defenders had no reason to be concerned for their safety. Disciplinary mechanisms were in place to prevent abuses by public officials and statistics on that subject would be provided in the future.

36. **Mr. Fellous** (Tunisia), referring to question 12, said that Tunisia had nine political parties, six of which were represented in the Chamber of Deputies. All political parties were free to publish their newspapers, and those represented in the Chamber of Deputies received a public subsidy for their activities. Unrecognized groups were treated in accordance with the Political Parties Act, which provided that they should act within the framework of the Constitution, defend the republican form of government and eschew violence and all forms of discrimination. The Act also stated that a political party could not be based on one religion, language, race, sex or region. The Tunisian authorities were in no way indifferent to acts of aggression, whatever the source, and if it was established that a law-enforcement official had carried out such acts, appropriate action was taken and the victims had every right to complain and obtain redress.

37. **Mr. Tekkari** (Tunisia), referring to question 13, said that it was of course the Government's policy to try and punish guilty officials or police officers, and to provide compensation to any persons detained without justification, as had in fact been done in two or three cases.

38. **Mr. Al-Ahmadi** (Tunisia) said, in response to question 14 regarding the right to a fair trial, that one of the requirements was certainly that evidence must be gathered transparently, without resort to violence, and that confessions obtained by force were inadmissible. The human dignity provisions of the 2002 Constitution and the whole body of law governing treatment in police custody made torture a crime, and provided safeguards such as the right to request a doctor when in police custody and — with the adoption of 2007 legislation — to have a lawyer present during interrogations. In practice, many convictions had been overturned because they had been based on forced confessions — one instance being as recent as 2005 — and the Government's policy was clear.

39. **The Chairperson** invited queries from the Committee on questions 1 to 14 of the list of issues.

40. **Ms. Chanet** observed that the high-level delegation had competently addressed many of the Committee's questions regarding the situation in Tunisia during the long period covered by the latest

report, which had been submitted late. Noting, however, that all the cases cited (reply to question 1) in which the Covenant or other international treaties had been invoked directly before the courts had referred exclusively to personal status law, she wondered if there had been no jurisprudence in other areas such as detention, torture or freedom of expression. Also, it would be useful for the Committee to know the specific reasons why Tunisia, which was a party to so many international treaties, had not as yet decided to accede to the second Optional Protocol, especially since it declared itself to be a de facto abolitionist State. The fact that its courts continued to hand down death sentences, even if not enforced, seemed inconsistent. Also, Tunisian law allowed detainees to be held in police custody longer than was recommended under the Committee's jurisprudence, and it was not clear how detainees would go about challenging the legality of their detention, especially in cases where they had no lawyer.

41. Regarding Tunisia's anti-terrorism laws (reply to question 5), the definition of terrorism adopted in Act No. 2003-75 allowed it to derogate from the country's accepted criminal procedure — and indeed from article 9 of the Covenant — by making it a crime simply to prepare to commit a terrorist act. Furthermore, the Act released any lawyer involved in a terrorist case from the obligation of professional secrecy towards his client, imposing instead an obligation to report to the authorities on the client's acts, and this contravened the Committee's jurisprudence on professional secrecy. It would be difficult to see how the accused could ever trust their lawyers under such circumstances. The delegation should clarify what was implied by the compulsory reporting requirements of witnesses to terrorist acts, and the right to punish them for not doing so. There appeared to be very few terrorism cases that had come to trial and resulted in convictions and even fewer disciplinary proceedings. Despite the lack of statistics, the delegation could perhaps provide information on some such cases; 19 of them were cited by major non-governmental organizations in the field.

42. The report spoke in generalities on the issue of torture, whereas there had been very specific complaints of torture at the hands of Tunisian authorities. She asked the delegation to comment on a recent judgment of the European Court of Human Rights upholding the refusal of another country to extradite to Tunisia because of the risk of torture there.

43. The delegation had discounted the claims of harassment made by human rights defenders, but, for one, the Special Representative of the Secretary-General on human rights defenders had in her reports E/CN.4/2002/106 and E/CN.4/2006/95/Add.5 recorded, respectively, an impressive 30 cases of harsh treatment and 78 instances of harassment complaints by journalists, militants, doctors, lawyers and others, and they could not all be described as paranoid. The charges brought against human rights defenders by the Tunisian authorities had been very vague, and she would appreciate further comment to justify the Government's repressive reaction in such cases.

44. **Mr. Bhagwati** expressed the hope that Tunisia, going beyond its policy of not enforcing any death sentences handed down, would soon abolish the death sentence de jure. He asked for more information about the High Committee on Human Rights and Fundamental Freedoms: on the appointment of its members, the qualifications required, the duration of their terms and especially how their independence was ensured, and also how often the High Committee — as well as the Ombudsman referred to in paragraph 72 of the report — had made recommendations to the Government on compensation to victims in the past three years. If such recommendations were not binding and if the Government rejected any of them, he wondered whether it had to give and publicize its reasons.

45. More information on the Administrative Tribunal (reply to question 1) would be useful: how its judges were appointed, the scope of their jurisdiction and their reporting obligations, and especially how their judgements and compensation decrees were enforced. While the Tunisian Constitution and laws guaranteed the independence of the judiciary, he was concerned that it was the Executive branch rather than the Judiciary which organized the examination and recruitment of judges and decided the grounds for disciplinary procedures.

46. **Mr. Glélé Ahanhanzo** observed that the delegation had given a very academic presentation of the issues, and that it was perhaps too neat to reflect the actual realities. The fact, for instance, that the proceedings and judgements under the anti-terrorism legislation were all secret and involved police officers and officials whose identity could be kept secret was a worrisome reminder of the "faceless judges" so

criticized elsewhere. The scope of the 2003 terrorist act was overly broad and should be limited.

47. It was claimed that non-governmental organizations had access to the prisons, but only foreign NGOs did. In the interests of freedom of expression, as well as of the necessary role of civil society proclaimed by the Covenant, local and national NGOs should also be given access. In general, he would like more information about what the Government was doing in practice in the various areas covered by the Covenant and what its future plans were to improve the human rights conditions of all its citizens.

The meeting rose at 6 p.m.

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International Covenant on Civil and Political Rights

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Ninety-second session

Summary record of the 2513th meeting
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08-27808 (E)

The meeting was called to order at 10.05 a.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Fifth periodic report of Tunisia (*continued*)
(CCPR/C/TUN/5; CCPR/C/TUN/Q/5 and Add.1)

1. *At the invitation of the Chairperson, the members of the delegation of Tunisia resumed their places at the Committee table.*

2. **The Chairperson** invited the Committee to continue its consideration of the fifth periodic report of Tunisia (CCPR/C/TUN/5) and drew attention to the list of issues (CCPR/C/TUN/Q/5) and the replies of the Tunisian Government (CCPR/C/TUN/Q/5/Add.1).

3. **Mr. Pérez Sánchez-Cerro** said that lack of freedom of expression in Tunisia continued to give cause for concern. According to reports by special rapporteurs, the sole press agency in Tunis was a public company that enjoyed a monopoly over national news and filtered information through to other media. The current situation therefore did not guarantee the rights provided for in article 19 of the Covenant. The establishment of other agencies would permit diversification of news coverage and encourage independent journalism. While censorship was not exercised officially, it did occur in practice, as attested to by the pressure on and incentives for journalists to write articles reflecting the political views of the Government.

4. Regarding terrorism, he was concerned that articles 49 and 51 of Act No. 2003-75 appeared to guarantee the anonymity of judges, thereby recalling the historical concept of "faceless judges". Such anonymity did not allow concerned persons to seek legal recourse; furthermore, the definition of terrorist acts was too general. He wondered whether the Tunisian Government planned to amend Act No. 2003-75 in order to bring it into line with international standards of due process.

5. Finally, with regard to human rights defenders, what explanation could the delegation give for the continued reports of physical aggression, surveillance, travel restrictions and other such violations?

6. **The Chairperson** suggested that further comments on freedom of expression should be deferred until later in the meeting, when that issue would be addressed by the Tunisian delegation.

7. **Sir Nigel Rodley**, referring to the death penalty, said he welcomed the fact that the Mercy Commission (Commission de Grâce) now took into account only the period of detention under sentence of death, and not the gravity of the offence itself, before deciding whether or not to commute a sentence. However, he wondered what exactly was the purpose of considering that length of time. While hoping that it was not, as it might appear, to keep a person *in terrorem* until subsequent commutation of sentence, he underlined that that might nonetheless be a consequence. What was the period allowed the Mercy Commission in deciding to pronounce a commutation of sentence? The State party had taken a very positive step in formally stating that it was a de facto abolitionist State, but it would be preferable for the death penalty not even to be pronounced.

8. Turning to articles 7 and 9, he said that it had been nine years since, as Special Rapporteur of the Commission on Human Rights on the question of torture, he had made a request to visit Tunisia, and nearly a year since the current Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment had reiterated that request. He therefore welcomed the indication in the Tunisian delegation's introductory statement that the State was now open to visits from the special procedures of the Human Rights Council and asked whether the current Special Rapporteur on torture might expect an invitation to visit in the near future.

9. With regard to allegations of torture or ill-treatment, he expressed concern at the statement that only allegations supported by solid evidence were recognized in Tunisia. Such language appeared to put the burden of proof on the individual, who was held in detention without access to the outside world. That was in fact a virtual negation of the rule that statements made under such conditions were not admissible in court. He therefore asked the Tunisian delegation to clarify the matter of the burden of proof.

10. Turning to the issue of prosecutions, he first expressed appreciation for the delegation's efforts to furnish statistics. Had there, according to the official data, been any prosecutions under Act No. 99-90? If so, how many, against whom, with how many convictions and with what types of sentences? He further noted that most of the cases brought against public officials who might have been responsible for abuses had involved the police and the National Guard.

He wondered whether there had been any proceedings against officials of State security agencies, in whose premises people were often detained and interrogated.

11. **Ms. Wedgwood**, referring to access to prisons and sites of detention, said that according to conversations she had had with members of the International Committee of the Red Cross (ICRC), visits to prisoners were subject to a confidentiality clause. Further to Sir Nigel Rodley's remarks, she emphasized the obligation for every site to be visited by independent monitoring bodies; otherwise, there would always be problems in overseeing personnel engaged in the act of detention, regardless of the supervision procedures employed.

The meeting was suspended at 10.20 a.m. and resumed at 10.35 a.m.

12. **Mr. Labidi** (Tunisia), in response to Ms. Chanet's questions on the existence of jurisprudence that directly applied international human rights standards, agreed that most of the examples provided in Tunisia's fifth periodic report had related to personal status. That said, Tunisian jurisprudence was generally known for its openness in applying the law, including the direct application of international treaties. A few examples of cases tried by the Administrative Tribunal and relating to freedom of opinion and expression had in fact been provided in his delegation's written replies. The decisions in each case, including those of the Constitutional Council, indicated that international treaties had higher authority than national laws. It was extremely desirable for all Tunisian judges to directly apply international treaties, as that fostered the positive development of Tunisian jurisprudence and guaranteed general freedoms.

13. **Mr. Tekkari** (Tunisia) said that, with a view to further developing a human rights culture and encouraging judges to apply standards of international law, a collection of national and international texts relating to human rights had recently been prepared and would be distributed to all Tunisian judges. The collection, which would be updated regularly, was confirmation of Tunisia's concern to ensure the continued observance of human rights.

14. As to whether Tunisia intended to accede to the Optional Protocol to the Covenant, he said that it was necessary to carry out a study before acceding to any human rights instrument. For example, Tunisia's review of the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women had enabled it to resolve a number of concerns in those areas. Tunisia did not fear individual complaints; on the contrary, it believed that such complaints furthered the development of international law. In sum, Tunisia was primarily concerned with achieving effective engagement, but looked forward to formal accession to the Optional Protocol in the future.

15. Reiterating the fact that Tunisia was a de facto abolitionist State, he said that his Government's attitude was not a static one. Regarding the commutation of sentences, all cases involving capital punishment were eligible for presidential pardon, which could be granted based on a report by the Mercy Commission. The novelty was the consideration of the objective criterion of the length of time elapsed from when the death sentence was pronounced. Those who suffered from the crimes in question needed to be appeased before commutation was pronounced, especially since capital punishment was imposed only for the most heinous crimes. Finally, although there was a movement for the abolition of capital punishment, supported in part by the Government, public opinion was not yet ready for such a step.

16. Replying to Sir Nigel Rodley's question on visits by special procedures of the Human Rights Council, he said that Tunisia had expressly indicated its intention to invite United Nations special rapporteurs as well as regional rapporteurs. As part of that initiative, an invitation might be extended to the Special Rapporteur on torture.

17. Regarding time limits on custody and the possibility of legal recourse in the event of excessively long or undue detention, the Criminal Code provided for a number of guarantees, including that the family be informed and that the detainee be maintained in good health. Moreover, the police officer responsible for the custody was under the authority of the public prosecutor. Violation of the rules was considered to constitute the offence of arbitrary detention, under article 103 of the Criminal Code, giving rise to a criminal sentence and also payment of damages, pursuant to the Act of 30 October 2002.

18. **Mr. Khemakhem** (Tunisia) said that, while the Tunisian authorities respected the ruling handed down by the European Court of Human Rights in the Saadi case, they had some concerns about the grounds for

that decision. In particular, although the judgment asserted that enforcement of the decision to deport the applicant to Tunisia would result in a violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, it was unclear how the Court had arrived at that conclusion.

19. It would appear that the Court had been influenced by the ongoing campaign of disinformation against Tunisia, which had resulted in the dissemination of a number of fictitious claims regarding the ill-treatment of Tunisian nationals. For instance, following the refusal of the Canadian authorities to grant refugee status to a Tunisian citizen who had failed to declare that he had a criminal record in France, Amnesty International had maintained that he would be at risk of torture or ill-treatment if he returned to Tunisia. However, the individual in question had been welcomed home by friends and family and had not expressed any concerns for his own safety. In addition, security concerns had prompted the deportation from France of a Tunisian national convicted of involvement in the assassination of an Afghan general. Despite claims that he might be tortured upon his return to Tunisia, the citizen concerned was safe and well.

20. The judicial authorities had opened investigations into each of the allegations made by the World Organization against Torture, which were taken very seriously by the Government. While some of those investigations had been closed for lack of evidence, others were ongoing. Lastly, the new article 101 bis of the Criminal Code had been applied by the ordinary courts in only a handful of cases. In one such case, four prison guards found guilty of mistreating a detainee had been sentenced to four years' imprisonment. The victim, whose injuries had necessitated the amputation of both his legs, had been awarded approximately US$ 250,000 in damages. The hierarchical superiors of the perpetrators had not been prosecuted because there had been no evidence to suggest that they had ordered the ill-treatment.

21. **Mr. Tekkari** (Tunisia), responding to a series of questions on counter-terrorism measures, said that the law on terrorism and money-laundering (Act No. 2003-75) was often misunderstood because it was read selectively. In accordance with article 11 of the law, individuals could not be prosecuted for merely having the intention to commit a terrorist offence; prosecution was possible only when such an intention was acted upon. It was clear from the provisions of the United Nations Convention against Transnational Organized Crime that the definition of intent applicable to organized crime differed from that used in the realm of ordinary law.

22. Read in conjunction with relevant legislation on professional secrecy, article 22 of the law on terrorism and money-laundering did not force lawyers to breach client confidentiality agreements. However, all individuals acting in their personal, rather than professional, capacity were bound by the reporting requirement set out in that article.

23. He expressed concern about the Committee's reference to "faceless judges" and stressed that all criminal proceedings in the State party were a matter of public record. On the other hand, as evidenced by the provisions of the United Nations Convention against Transnational Organized Crime, it was perfectly legitimate to conceal the identity of witnesses, judicial police officers or members of the judiciary if the purpose of such measures was to ensure the proper administration of justice. Suspects and their legal teams were entitled to request the lifting of those measures, which, in practice, were implemented only in exceptional cases where the aforementioned individuals were in real danger. To date, those measures had not been used during criminal proceedings relating to terrorist offences. Tunisia had been a victim of terrorism and remained a target. The authorities were therefore striving to strike a balance between the need to adopt effective counter-terrorism measures and the need to give priority attention to the protection and promotion of individual human rights.

24. With regard to women's rights, the State party had made significant progress towards its ultimate goal of achieving gender equality by, inter alia, outlawing polygamy. It was determined to pursue those efforts in spite of the negative reactions of some elements of society.

25. In response to the questions posed by Mr. Bhagwati, he said that the composition of the High Committee on Human Rights and Fundamental Freedoms must reflect a broad spectrum of views. Independent members of the High Committee were selected on the basis of their human rights experience and their personal integrity, and representatives of ministerial departments were not permitted to participate in its decision-making or voting processes.

The High Committee's recommendations on the matters of which it was seized were routinely taken into consideration by the Government.

26. During the reporting period, the Ombudsman had made 92 recommendations, of which 73 had been implemented. One such recommendation had led to the preparation of a legislative proposal on the right of appeal against rulings handed down by the property courts. At the invitation of the entities concerned, the Citizen Supervisor visited public institutions and made recommendations for improvements. As far as the recruitment of judges was concerned, the executive branch was responsible only for prescribing the eligibility rules for participation in competitive examinations. Selection panels were composed exclusively of eminent members of the judiciary.

27. Lastly, on the issue of prison visits, it should be noted that the High Committee on Human Rights and Fundamental Freedoms, as well as ICRC, regularly visited Tunisian detention centres and made relevant recommendations. Members of non-governmental organizations (NGOs) were also permitted to visit prisoners with a view to preparing them for release and social reintegration. In order to protect the privacy of the individuals concerned, however, consent was required for such visits. Since the agreement concluded between the Government and ICRC included a confidentiality clause, the State party was unable to reveal the content of the latter's reports on its prison visits, but the effect of those visits had been overwhelmingly positive and had contributed to changing the mentality of prison staff and administrators. With a view to building on those positive developments, the Government had recently invited Human Rights Watch to visit detention centres in Tunisia.

28. **Ms. Chanet** said that Tunisia's policy on capital punishment could not be truly abolitionist if it included criteria for the length of the waiting period before a death sentence could be commuted. There was no need for such criteria if all death sentences were to be commuted systematically in any case. Moreover, they added an extra penalty to the one already imposed by suspending a sword of Damocles over the head of the person condemned and amounted to cruel, inhuman or degrading treatment or punishment.

29. Concerning unlawful detention, the delegation had only addressed the issue of compensation and arbitrary detention. Article 9, paragraph 4, of the Covenant, however, did not necessarily relate to arbitrary detention. Detention could be unlawful without being arbitrary. Furthermore, compensation was made only after the event. The provision in question related to the right of any person detained to take proceedings before a court without delay. The delegation's response made it clear that there was no such court to meet the requirements of that provision.

30. The replies of the delegation to the questions raised about torture, including issues relating to the burden of proof, the anonymity of interrogators, the failure to prosecute offenders and the Saadi case heard by the European Court of Human Rights, implied that it was denying that torture existed in Tunisia. In practice, however, such a denial meant that the necessary preventive measures were not being taken.

31. With respect to statements concerning the difference between attempting and preparing to commit a terrorist act, the work of Mr. Jean Pradel did not reflect the entire literature on the issue and his theories had had difficulty in gaining acceptance in the case law and legislation of his own country, France.

32. **Sir Nigel Rodley** said, with regard to the Mansouri case referred to in the report of the World Organization against Torture of March 2008, that the law requiring the individual superior to be shown to have ordered the treatment in question was a serious obstacle to ensuring hierarchical responsibility. The Convention against Torture did require the establishment of liability based on *respondeat superior*. The suggestion that it was for the victim of torture not only to demonstrate what had been done by the individuals if they could be identified but also to prove that the superior authorities of those individuals had given particular orders established an unreasonable burden of proof. It also encouraged superior authorities to issue undocumented orders or make hints and leave it to junior officers to bear criminal responsibility for what might be done on that basis.

33. With respect to the Saadi case, in dealing with charges of violations of human rights in general and torture in particular there were bound to be some false allegations. Persons who had signed confessions might wish to absolve themselves of responsibility by making false allegations against the police or other detaining or interrogating authorities. In that connection, he was astonished by the unwillingness of many Governments

to provide those authorities with the means to demonstrate that they had behaved properly. However, as a Special Rapporteur, he had always made it clear in his reports to the Commission on Human Rights that he would give the benefit of the doubt to the individual when making urgent appeals, not as a means of accusation against authorities but rather of ensuring that there was no ill-treatment. It was inaccurate to say that there had been some kind of defamatory campaign in the Saadi case; the Government of Italy had not sought to defend the argument that there had been a risk but had simply argued that the risk should be treated in a particular juridical way in a national security case. The European Court of Human Rights had had information from Amnesty International and Human Rights Watch. The Committee had enough experience of human rights organizations over the years to be doubtful when Governments made accusations that there had been campaigns against them, particularly by the two NGOs in question.

34. He invited the delegation to comment on information which had appeared in *The Washington Post* on 2 September 2007 about two Tunisian nationals, Abdullah al-Hajji and Lofti Lagha, who had been held without charge for five years at Guantánamo Bay and then returned to Tunisia. One had told his lawyer that he had been coerced into making a confession. There was little information on the other detainee except that he had been held in detention without access to a lawyer in the Ministry of the Interior for 10 weeks. The testimonies of long-term detention in the Ministry and elsewhere had been too numerous to discount. He urged the delegation to consult with its authorities on the reality which might be behind many of the allegations of ill-treatment. He would like to know whether the Special Rapporteur on torture would indeed receive an invitation to visit the country.

35. **Ms. Wedgwood** enquired whether ICRC was permitted to visit any site it wished. She also asked whether the Tunisian Government was considering ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which would enable the Court to take original jurisdiction of individual complaints.

36. **Mr. Bhagwati** said he would like to know the percentage of cases which had been taken in appeal as a result of the introduction of the right of appeal in criminal cases in Tunisian law. He would also appreciate information on human rights training for law enforcement officials.

37. **Mr. Tekkari** (Tunisia) said that the Government did not interfere in the activities of human rights defenders so long as they acted lawfully. When their rights were infringed, they could take proceedings before a court. When there was any complaint about ill-treatment the court rather than the complainant was responsible for providing supporting evidence. The complainant must simply show that the facts were reliable. In the Mansouri case, the complainant had not presented evidence but, rather, filed a serious complaint. It was the medical report which had led to the sentencing. Concerning the liability of superior authorities, they were not immune from sentencing when their responsibility for an offence was established. However, there could be no presumption of liability in criminal cases. In the Mansouri case, the superior authorities in question had not been found accountable for the offence in any way.

38. With respect to the doctrinal discussion on the definition of terrorism, Mr. Pradel's opinions were shared by others, including Mr. Jean-Paul Laborde, in his work *Etat de droit et crime organisé*. They were also reflected in the United Nations Convention against Transnational Organized Crime, which, like Tunisian law, defined terrorism as an organized crime.

39. While the Covenant did not require States parties to abolish the death penalty, his Government had embarked on an abolitionist course in the interest of human rights. It had made a solemn commitment not to execute persons sentenced to death. Although those persons would have their sentences commuted to prison terms, that could not be done immediately following the sentencing. The Mercy Commission had established criteria for a period between the time of sentencing and commutation of the penalty. Although a pardon was requested automatically, the lapse of time made it easier for the victims to accept commutation. The policy followed took into account the rights of both the person sentenced and the victims. In addition, for various reasons, society had not yet accepted the abolition of the death penalty.

40. There had indeed been false accusations of torture and ill-treatment made for political purposes which had been presented to the United Nations, in particular. Of course, that in no way signified that acts

of torture had not occurred. The relevant judicial authorities followed up on all serious allegations of torture and ill-treatment and unfailingly punished any such acts when they were proved, in accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

41. Concerning the two Tunisian nationals previously held at Guantánamo Bay, their lawyers' allegations that their clients had been ill-treated had not been proved. One such allegation involved makeshift eyeglasses which allegedly had not met the prisoner's health requirements. It had turned out that the prisoner had not wished to exchange the glasses, which had been issued to him by the United States authorities and were made of plastic for security purposes.

42. Concerning the question raised about the Special Rapporteur on torture, he was indeed invited to visit the country. ICRC had visited the country several times without restriction. It had contacted some 5,000 prisoners and visited every facility it wished. Lastly, human rights training was provided to all law enforcement officials, including police officers, customs officials and magistrates. The Ministry of Justice and Human Rights had worked with the Ministry of the Interior to provide such training. In addition, human rights manuals were distributed to the relevant officials and the rights of prisoners were posted in prisons.

43. **Mr. Romdhani** (Tunisia), referring to questions on freedom of opinion and expression, said that every effort had been made in the past two decades to promote press freedom in Tunisia and ensure that all citizens had free access to sources of information. Since 1987 no newspaper or magazine had been suspended and no journalist had been imprisoned. Article 8 of the Constitution guaranteed freedom of the press and of expression, supported by the Press Code which had been amended several times in the interests of greater liberalization. The Press Code no longer provided for the offence of "defamation of public order" or for imprisonment under its own provisions; it reduced the maximum period of suspension of a publication from six to three months; it increased the proportion of journalists required to hold university degrees; and it abolished the legal deposit requirement for publications. Journalists enjoyed freedom of professional organization and had recently elected their first syndicate; they practised their profession without any interference from the Government. Moreover, the President of the Republic often called on journalists to desist from self-censorship. Nearly all the print media in Tunisia were financially independent, thanks largely to revenue from advertising, which was unregulated. There were no restrictions on the publication of opposition newspapers; they had every freedom to criticize the Government, which even provided them with material support, thereby enabling them to appear more regularly and contributing to the significant growth of the newspaper industry in recent years. Radio and television programmes regularly featured representatives of the opposition parties. The State no longer exercised a monopoly over broadcasting, which since 2003 had been moving increasingly into the private sphere, particularly by virtue of international satellite links, to which there was unrestricted access: the majority of households owned satellite dish receivers. Similarly, the Government was endeavouring to ensure universal access to the Internet, with particularly favourable conditions for media professionals and encouragement for the creation of websites. As for books, their publication received State support and was not subject to any control. Lastly, the Higher Communication Council, established as an advisory body in 1988, had become an autonomous institution with larger representation of opposition forces and civil society.

44. **Mr. Tekkari** (Tunisia), taking up question 17 on the list of issues, emphasized that the prohibition contained in the Electoral Code against Tunisians expressing an opinion for or against a Presidential election candidate to foreign media applied only to the electoral period. As there was unequal access to foreign audio-visual media, that prohibition ensured greater equality between candidates. Moreover, the penalty was purely financial and did not take the form of deprivation of liberty. He referred the Committee to article 37 of the Electoral Code, which, in the same spirit, ensured transparency of electoral financing and eliminated any unfair advantage between candidates, particularly in terms of access to the mass media.

45. **Mr. Fellous** (Tunisia), turning to question 18, said that article 8 of the Constitution, together with legislation adopted in 1969, guaranteed freedom of assembly, subject to internationally recognized conditions, such as there being no threat to public order and no infringement of the law; for that purpose, officers were required to be appointed. No additional measures were needed to ensure compliance with article 21 of the Covenant. Every day numerous

meetings were held throughout the country on human rights questions, including at public venues. He cited examples of NGOs such as Amnesty International that had recently held such public meetings in Tunisia.

46. **Mr. Tekkari** (Tunisia), with reference to question 20, said that since 1988 no authorization had been required from the public authorities in order to set up an association. A simple declaration sufficed; if no objection was expressed by the public authorities, the association would be considered established three months after the date of deposit of such a declaration. In the event of an official refusing to accept the declaration, there were other legal means of having the declaration registered, in particular through the services of a notary. In addition, the Administrative Tribunal could overturn a decision to refuse permission to establish an association; it had done so in a number of recent cases.

47. **Mr. Chagraoui** (Tunisia), addressing the question of the protection of Berber culture (question 21), said that the Tunisian blueprint for society, in place for some 50 years, transcended the logic of a majority or minority culture. The mainsprings of the country's heritage were cross-fertilization, equal citizenship, solidarity and universality. At school and university, history was taught from the earliest times to the modern age in a global perspective, without any attempt to differentiate between the Arab and Berber strands of the population; article 6 of the Constitution guaranteed the equality of all citizens, regardless of religious or ethnic allegiance; similarly, all citizens enjoyed equality in respect of education and the fruits of development; and, lastly, every effort was being made to combat any tendency towards Islamocentrism and to resist the paradigm of a clash of civilizations.

48. **Mr. Ayed** (Tunisia) said that in the 14th century A.D. Ibn Khaldun had written that the Berbers ate couscous, wore burnouses and shaved their heads. While the latter characteristic varied according to fashion, the first two applied to all Tunisians. From the viewpoint of both religion and language, Tunisia was a homogenous country, whether of Arabized Berbers or Berberized Arabs, and had forged a unity in diversity down through the ages; therein lay its richness. Had there been any discrimination against any population group, it would certainly have been noted by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

The meeting rose at 1.05 p.m.

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Ninety-second session

Summary record of the 2514th meeting
Held at Headquarters, New York, on Tuesday, 18 March 2008, at 3 p.m.

Chairperson: Mr. Rivas Posada

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Fifth periodic report of Tunisia (*continued*)

This record is subject to correction.

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08-27519 (E)

The meeting was called to order at 3.05 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Fifth periodic report of Tunisia (continued)
(CCPR/C/TUN/5, CCPR/C/TUN/Q/5 and Add.1)

1. *At the invitation of the Chairperson, the members of the delegation of Tunisia took places at the Committee table.*

2. **The Chairperson** invited the members of the delegation to address the remaining questions on the list of issues (CCPR/C/TUN/Q/5/Add.1).

3. **Ms. Souayhi** (Tunisia) referring to question 21 regarding minority rights and specifically the issue of religious freedom in Tunisia, said that all religious minorities, both Christian and Jewish, were guaranteed full freedom of worship, under chapter 5 of the Constitution and the very tolerant body of laws on the matter. The activities of the 14 Roman Catholic parishes were regulated by a convention between the State and the Vatican. All Tunisian citizens, regardless of culture, religion, conviction, colour or sex, enjoyed the same freedoms. The religious peace that reigned in Tunisia was a precondition for the general peace in the society. The Muslim majority was by tradition respectful of all minority religions. The Ministry of Religious Matters — significantly, not "of the Islamic faith" — provided financial assistance for the maintenance of all churches and mosques and for their cemeteries. There was no mention of religion on an individual's identity document. Education on tolerance, inclusiveness and the right to be different was part of the curriculum at all levels, from the elementary schools to the universities.

4. Christians who married Muslims could freely exercise their own religion under 2005 legislation on coexistence and tolerance; a new university faculty on dialogue among religions had been established in 2001 and a research centre on civilizations and cultures in 2003; and various symposiums and proclamations fostered peace and religious freedom. Tunisia was a modern Arab Islamic country, unlike some others in the Arab world. A trend towards fundamentalism, especially in sensitive areas like the rights of women, had led the Government to take action to prevent a fundamentalist ideology from taking over the country, and its decisions had been consistent with articles 18 and 27 of the Covenant.

5. **Mr. Bismuth** (Tunisia) said that, from his experience as a Jewish citizen of Tunisia, proud of both his heritages, he could testify to the changes that had taken place since independence. After careers as a businessman and an administrator in different fields, he had spent the last 40 years in government service and was now honoured to be serving in the Senate. Throughout his life he had always been free to exercise his rights actively. Tunisia's accession to the Covenant had simply ratified the existing state of things. The word tolerance was too mild with respect to religious freedom in the country: the Government demanded that its citizens respect all religions, whose celebrations it encouraged and often sponsored. Jews, Christians and Muslims were all free to practice their faiths, and their ways of life reflected their cultural identities, creating a diversity that the Government favoured.

6. **Mr. Khemakhem** (Tunisia), observing that his Government attached particular importance to fostering a human rights culture and highlighting the principles of the Covenant, said, with reference to question 22, that it had set up specialized courses on human rights for judges, police officers and prison authorities, which reviewed the provisions of all the international human rights instruments and stressed human rights law.

7. Turning to question 23, he said that Tunisia was making an effort to disseminate the provisions of the Covenant and to publicize the Committee's concluding observations, for it valued its recommendations and comments. In the preparation of its reports to the Committee and the other treaty bodies, the Government always tried to include as broad a range of non-governmental organizations as possible — representing journalists, workers, women, proponents of the rights of the child and so on — in the process.

8. **Mr. Tekkari** (Tunisia) specified that the Government, having found the mechanisms in place inadequate, was establishing a unit under the direction of the Human Rights Coordinator within the Ministry of Justice and Human Rights, which in coordination with other ministries and with NGOs in the field would be responsible for following up on the Committee's recommendations and seeing that they were implemented.

9. , **Mr. Khalil**, returning to question 14 of the list of issues, asked what action would be taken by a judge if in the course of a trial a defendant stated that his confession had been forced.

10. Regarding question 15, there had been a number of encouraging developments relating to freedom of opinion and expression: offences such as defamation had been abolished in order to prevent the abuse of journalists legitimately exercising their profession; many private newspapers and broadcasts were flourishing; and, especially since the 2006 amendments to the Press Code, the number of opposition papers was growing, as was the financial aid given them by the Government — a fact which had attracted attention abroad. Nevertheless, one was struck by the relatively large number of alleged violations of freedom of expression, such as those documented in the 2002 report of the Special Representative of the Secretary-General on human rights defenders (E/CN.4/2002/106), which clearly supported the contention that there was a wide gap in Tunisia between law and practice.

11. The delegation had maintained, in commenting on question 16, that the Government placed no restriction on electronic news or websites except for those that compromised human rights; but reliable international NGOs said that such a justification was used precisely to curtail the legitimate activities of human rights defenders or opposition parties, whose websites were blocked or whose articles were denied press publication. Those reports and the restrictions on freedom of expression reported by the Special Representative of the Secretary-General on human rights defenders in 2006 pointed to a pattern of government harassment of those who sought to express themselves.

12. Referring to question 17, he wondered whether all political parties were treated equally in the official Tunisian media, and if so, why some parties would seek to air their political views through outlets outside the country. On question 18, he quoted excerpts from the newsletter of the Arab Organization for Human Rights, in which the Tunisian League for Human Rights denounced the Tunisian authorities' two-year siege on its independent premises as being in violation of domestic laws and various international treaties ratified by Tunisia and called for it to be lifted. According to the newsletter, the authorities had banned the League from holding its national conference on two occasions and intimidated and physically assaulted League representatives, preventing them from exercising their right to freedom of assembly. Furthermore, the Government continued to obstruct the activities of independent associations and opposition parties. Nevertheless, the Committee acknowledged the fact that the Government, as stated in its written reply, had allowed Amnesty International and two opposition parties to assemble in public in Tunisia. He hoped that such a development signalled an improvement since 2006, when the Special Representative of the Secretary-General had expressed grave concern over impediments to freedom of assembly.

13. With regard to question 19, he would welcome more information on the criteria applied in declaring a meeting illegal, which, in the Government's written reply, were merely described as those specified by law. He wondered whether the meetings declared illegal over the previous five years were confined to international associations supporting political prisoners; he also wondered how many political prisoners were still behind bars. He had the clear impression that criticism of the Government was far from tolerated, an issue that had already been underlined in the Committee's concluding observations on Tunisia's fourth periodic report.

14. **Mr. Lallah** welcomed the delegation's informative report, especially the valuable information on the Berbers, but expressed regret that some of its answers to the Committee's questions, including with regard to question 20, concerning recognition and registration of the associations of human rights defenders, were unsatisfactory. Indeed, the lack of specific answers to the Committee's questions was troubling. The Committee had posed those questions legitimately, relying on the information provided by the Special Representative of the Secretary-General on human rights defenders in her report (E/CN.4/2006/95/Add.5). In the Tunisian delegation's response to the Committee's questions on the matter, the Minister of Justice had advised human rights defenders to take legal action in court to obtain official registration and recognition. He wondered whether there were associations that had fulfilled the requirements for registration; whether those associations with pending cases had been informed as to why their applications were turned down; and how long it would take for an association to become registered through the court proceeding advised by the Minister.

15. Despite the very real challenge of fanaticism that Tunisia faced, laws and governments could not handle those situations alone. The cooperation of the thinking part of society, represented by associations of human

rights defenders, was required, and alienating those potential allies against extremism would lead to a loss of confidence in the administration and provide fertile breeding grounds for extremists. He appealed to the delegation to find a prompt and effective remedy that protected the right to organize under article 22 of the Covenant.

16. **Ms. Wedgwood,** referring to the freedom of expression, said that, while she acknowledged and shared the Government's genuine concerns over incitement to violence and terrorism, she found its approach to press freedom troubling. She welcomed the statutory amendments introduced in recent years but noted that the Government might want to consider additional amendments, given that the provisions of the Tunisian Press Code might prevent journalists from voicing their opinions about the performance of government agencies. She found it unusual, for example, that the Press Code made it criminally actionable to defame not only individuals but also institutions and that it criminalized defamation of government officials in the performance of their duties.

17. Referring to the State party's reply as to whether the Organizational Act 2003-58 was compatible with article 19 of the Covenant, she noted that, while elections were an exclusively sovereign matter in the exercise of the franchise, she considered it unusual that Tunisians were prohibited from voicing their preference for a particular candidate.

18. With regard to Internet access, she wondered whether the delegation could comment on the independence of Internet service providers from the Government, as there had been allegations that Tunisia's two service providers were owned by relatives of President Ben Ali. Paragraph 286 of the country's report stated that it was becoming essential to place the Internet at the heart of a public and civic battle to control its content and availability. Although she understood the need to prevent incitement to racial or religious hatred and appreciated the tolerance that Tunisia had shown of different ethnic communities, she felt that controlling the content of the Internet, apart from the issues of pornography and incitement to violence, was not the Government's business. The Internet was the main medium of communication for the youth as well as the new form of publishing. She expressed concern over the lack of access in Tunisia to downloads from abroad that could readily be obtained in most countries.

19. She noted that the provision under the Press Code that required newspapers to employ a certain number of journalism school graduates as reporters would prevent ordinary citizens from publishing their own newspapers and thus limit freedom of speech, a consequence that Tunisia would surely not want in the long run. Finally, the requirement of a money deposit before newspapers could publish might inhibit their freedom of expression because it introduced the Government into the process at such an early stage. Noting the need for autonomy and self-regulation in the press, she pointed out that the Government might wish to rethink that policy in its next set of administrative and legislative reforms.

20. **Ms. Motoc** asked how Tunisia was dealing with the new principles introduced by the Convention on the Rights of Persons with Disabilities and how it ensured that the rights of such persons were observed.

21. **Mr. Tekkari** (Tunisia), referring to the right to a fair trial, said that it was important to consider the background to any allegations of unfairness. Sometimes, requests were made for up to 100 lawyers to attend a trial, although it was not necessarily possible to accommodate them in the physical space available. In one case, when the judge had requested that the lawyers attend in small groups, the lawyers withdrew, claiming that the trial was unfair. At the recent Soliman trial, the court had been obliged to listen to 24 continuous hours of pleadings as each of the numerous defence lawyers had spoken for as long as they wished. Yet there had still been claims that the trial was not fair. It was important to avoid mixing politics and human rights.

22. On the question as to how the courts handled cases filed by victims of torture, the Court of Cassation had made it quite clear that any statement made under torture was inadmissible. Anyone who had suffered abuse could apply to a higher court official who would bring the matter before a judge.

23. With regard to freedom of opinion, he said that both direct and indirect subsidies were available to newspapers that were in the process of being set up. No newspaper had been suspended and there was diversity in both the print and audio-visual media. Both party newspapers and the private and independent media criticised political parties. The situation might not be perfect, but progress was being made.

24. In response to a question about the closure of websites, he said that websites were only closed if they contained pornographic material or incited violence. One well-known case involved the Internauts of Zarzis: three years previously, a group of Tunisians had been arrested and accused of involvement in terrorist acts because they had learned from the Internet how to make explosives, had carried out some tests and had identified the places that they wanted to destroy. They had subsequently been released, but one of them had died soon afterwards in Somalia in a terrorist act while another had been sentenced in France in absentia for terrorist activities. The Internet basically promoted freedom but it was important to distinguish between using it for access to information and using it for terrorist purposes, as there were many abuses. Another website that had been shut down advocated suicide attacks and beheadings in Tunisia. Such sites could exert a dangerous influence on young people who could easily be lured into becoming suicide bombers.

25. Referring to question 16 of the list of issues, Mr. Khalil had mentioned 64 communications regarding 78 persons who were victims of threats or intimidation. The only journalist currently in detention had been detained not for his opinions but for the common law offence of insulting law enforcement officers. The fact that he was a journalist did not give him immunity.

26. Turning to the right to peaceful association and the Tunisian League for Human Rights, he said that the League had an internal conflict which its own bodies had been unable to resolve. In preparing for its congress, the League had violated its own rules and it was members of the League who had brought the matter to court. The congress had been cancelled, not because of any infringement of the right of association, but because a court judgement was being executed. The fact that some of those involved were close to the majority party did not give them any more rights than the others and the judge had not taken into account their political affiliations. Tunisia nevertheless considered the League to be a national asset and hoped that its members would reach an understanding so that it could take its rightful place in Tunisian civil society as a defender of human rights.

27. There were two criteria for considering a meeting illegal: meetings that were not registered in advance or those that posed a threat to public order. While the Government did not authorize meetings, it could prohibit them. The term "meeting" meant a large group of people, not a chance meeting of six people at a café. An administrative judge ruled on matters of public order. In the case of the League for Human Rights, the judge had issued a decree within three days. Some substantive matters might take longer, but sometimes the accused persons intentionally used delaying tactics. The delays helped them to portray themselves as victims, which gave them certain advantages.

28. Turning to the issue of political prisoners, he said that no one in Tunisia was in prison because of their political views or peaceful political acts. Some prisoners were members of political parties, but they had committed common law offences and were not political prisoners. Drug traffickers belonged to all kinds of political groups. Some criminals were members of violent terrorist movements. That did not mean that they were political prisoners. All prisoners could exercise all of their rights, including being considered for conditional release or clemency, regardless of their political views and affiliation.

29. On the recognition of associations, he said that if an application for registration of an association was rejected, the matter could be brought before an administrative judge. There had been several recent cases in which the judge had revoked the Ministry of the Interior's decision to reject an application after reviewing the reasons given by the Ministry of Justice for the rejection. In one case, the reason had been that the association was going to provide a public service. The judge had decreed that the public administration did not have a monopoly on providing public services and that an association was also entitled to do so.

30. Responding to a question about the Press Code, he noted that Tunisian law was based on Roman and French law and was therefore more formal and less liberal than other systems based on common law. Defamation, as defined in the Press Code, was not mere criticism, but an attack on the reputation of an individual. If it was claimed that an individual had provided a bad service, that was a matter of opinion, but claiming that he was a thief could be defamation and could entail criminal penalties. In response to a question about the electoral code, he said that an electoral campaign took place during a specific time frame established by law. Individuals were entitled to put forward their points of view, but not to carry out a parallel campaign to incite people to vote a certain

way. That was the case for both legislative and presidential elections.

31. **Mr. Romdhani** (Tunisia) said it was not true that the State press agency, Tunis Afrique Presse, had a monopoly on information. The agency offered subscription-based news services to newspapers and other media, but they were not obliged to publish its dispatches. Opposition leaders and NGO heads enjoyed unrestricted freedom of expression and were given prominent exposure in independent newspapers. While acknowledging that the process of building a free media was ongoing, he said the notion that there was a gap between the theory and practice of freedom of expression was unfounded.

32. Turning to access to information via the Internet, he said that Tunisians had full and unfettered access to the websites of international human rights organizations such as Amnesty International and Human Rights Watch. However, it was important to understand that those who misused the Internet were in fact abusing the right of advocacy. Commenting on the allegations that the President of Tunisia exercised control over Internet service providers (ISPs), he said that there were 12 independent ISPs operating in the country and urged the experts to check the facts for themselves.

33. As for the provision requiring newspapers to hire journalism school graduates as reporters, he saw no reason why such a requirement would be detrimental to the freedom of expression. The requirement was merely a measure that had been taken in order to ensure that a sufficient number of jobs would be available for journalism school graduates.

34. **Mr. Tekkari** (Tunisia) noted, in response to a question on the role of civil society, that civil society organizations had an important role to play and that the Government had made every effort to involve those organizations in its work. The report clearly reflected the involvement of such organizations and the Government's adherence to the Committee's recommendation on the protection of human rights.

35. Tunisia was a signatory to the Convention on the Rights of Persons with Disabilities and its Optional Protocol. In that connection, numerous affirmative action measures had been taken, including, inter alia, requiring all public buildings to be accessible to disabled persons. Special, non-fee paying schools for the physically and mentally disabled had been established. Initiatives had also been undertaken with a view to ensuring the full integration of disabled persons into society and to providing them with employment. To that end, the Civil Service Act provided that persons with disabilities should constitute 1 per cent of all those recruited for employment in the civil service.

36. **Mr. Ayed** (Tunisia) said that under the Education Act of 2002 the Government was obliged to provide for the exercise by disabled children of their right to education. In that connection, special arrangements had been made to integrate such children into regular classrooms. In addition, class size was restricted to 15 children in order to allow teachers to devote their attention to all pupils equally. There were also specialized schools for disabled persons with needs that could not be accommodated in ordinary schools.

37. **Mr. Bismuth** (Tunisia) said that many persons with disabilities were productive members of the workforce.

38. **The Chairperson** welcomed the progress that had been made by the State party with respect of the protection of human rights and the fact that international instruments had primacy over domestic law.

39. In other countries, the Head of State did not preside over the judiciary. While assurances had been offered that the President of the Republic was merely the titular head of the High Council of the Judiciary, the Committee was nonetheless concerned by the implications that such an arrangement might have for judicial independence.

40. Turning to the State party's counter-terrorism laws, he said that there was a danger that those laws could threaten human rights. The use of anonymous judges and witnesses, while in itself not a violation of the Covenant, nonetheless had the potential to restrict some of the guarantees that the Covenant provided. Thus, it was incumbent on the State party to ensure that such anonymity did not affect the full exercise by the accused of the right to self-defence.

41. The Committee, while welcoming the steps that had been taken towards abolishing the death penalty, noted with concern that the State party intended to continue imposing the said penalty, even though it had no intention of actually putting anyone to death. Yet for a prisoner condemned to death, the mere threat that he

might be executed was degrading treatment, regardless of any assurance to the contrary offered by the State.

42. The Committee was pleased with the comprehensive information that had been provided regarding the prosecution of police and corrections officers accused of torture or cruel and inhumane treatment. Nonetheless, the Committee remained concerned by reports and specific accusations it had received that the State party continued to practice torture and looked forward to receiving more detailed information in that regard. The Committee also intended to keep a close watch on legal cases centring on freedom of expression and wished to receive more information in respect of journalists who had been imprisoned for the performance of their duties.

43. Freedom of assembly and association were subject to regulations that could result in the violation of rights enshrined in the Covenant. Although meetings could be held without obtaining official authorization, the right of assembly could nonetheless be curtailed under the law. He wished to know more about the security considerations and other criteria that were applied by the courts when deciding whether a meeting should be prohibited.

44. **Mr. Tekkari** (Tunisia) thanked the Committee for a fruitful dialogue recalling the concerns raised over the fact that the President of the Republic was the head of the High Council of the Judiciary, he said that similar arrangements existed in other countries, including, for example, France, Italy and Morocco. However, such arrangements had no effect whatsoever on judicial independence because the Head of State was merely performing a ceremonial role.

45. Turning to the question of torture, he said that his Government would invite to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to visit Tunisia and would continue to honour its agreement with Human Rights Watch with respect to prison visits. Noting that he looked forward to receiving the Committee's recommendations he stressed that his country would continue to move forward vigorously on human rights issues.

The meeting rose at 5.05 p.m.

United Nations CCPR/C/SR.2515

International Covenant on Civil and Political Rights

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Human Rights Committee

Ninety-second session

Summary record of the 2515th meeting
Held at Headquarters, New York, on Wednesday, 19 March 2008, at 11 a.m.

Chairperson: Mr. Rivas Posada

Contents

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Initial report of Botswana

This record is subject to correction.

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Any corrections to the record of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-27638 (E)

The meeting was called to order at 11.10 a.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Initial report of Botswana (CCPR/C/BWA/1; CCPR/C/BWA/Q/1)

1. *At the invitation of the Chairperson, the members of the delegation of Botswana took places at the Committee table.*

2. **Mr. Skelemani** (Botswana), introducing the State party's initial report (CCPR/C/BWA/1), said that Botswana's commitment to the promotion and protection of human rights and fundamental freedoms was evidenced, inter alia, by its accession to eight of the thirteen core human rights treaties and by its support for the new Human Rights Council and the universal periodic review mechanism.

3. Since its independence, Botswana's adherence to the basic principles of democracy, its respect for the rule of law and its willingness to enter into dialogue had made it the envy of many. There had been significant progress towards gender equality, and efforts to reduce poverty levels had borne fruit: the poverty rate had decreased from 47 per cent in 1994 to 30 per cent in 2004. The fight against HIV/AIDS remained a challenge, but the Government was hoping to reduce the number of deaths and new infections.

4. Over the past decade, Botswana had emerged as a worldwide leader in terms of economic freedom, transparency and good governance and had established a number of institutions designed to promote good governance and accountability. Its steady economic growth was largely attributable to revenue from the mining industry and the prudent management of resources, most of which had been used to enhance human capital and improve infrastructure throughout the country. Education, health and other social services were available to all citizens, regardless of their tribal or ethnic origin, and the eradication of illiteracy was among the Government's priorities. As a young democracy, Botswana placed particular emphasis on nation-building and development and had no doubt that the measures implemented in those spheres would contribute to the full enjoyment of human rights by all its citizens.

5. **The Chairperson** invited the delegation to address questions 1-13 on the list of issues (CCPR/C/BWA/Q/1) and in that connection drew attention to a document containing written responses from Botswana.

6. **Mr. Skelemani** (Botswana) apologized for the late submission of the written replies to the list of issues. Referring to question 1, he said that international treaties and agreements did not have the force of law in Botswana until they had been incorporated into its domestic legislation. However, given that the act of acceding to such treaties and agreements indicated the Government's intention to abide by their provisions, the courts made every effort to interpret the Constitution and statutes in such a way as to ensure respect for the country's international commitments. Although the Covenant had not yet been incorporated into domestic legislation, the Constitution, if properly read and barring a few grey areas, was broadly in line with its provisions.

7. There had been no training workshops on the Covenant for members of the judiciary because judges were required to take account of the provisions of international treaties and agreements when interpreting domestic laws and were therefore presumed to be familiar with them.

8. **Mr. Makgonatsotlhe** (Botswana), referring to question 2 on the list of issues, said that, while no specific measures had been taken to raise awareness among traditional leaders of tribes of the rights protected by the Covenant, it should be emphasized that those leaders were not permitted to enforce customary law, which was unwritten and varied from tribe to tribe. It would be extremely difficult to incorporate the provisions of the Covenant into customary law.

9. As for the role and responsibilities of the Ombudsman (question 3), the Office of the Ombudsman had been established in 1995 by act of parliament. Its mandate was limited to issues relating to maladministration in the public sector and thus human rights violations committed in the private sector fell outside the scope of its jurisdiction. Over the preceding five years, the Office had received complaints relating, inter alia, to unlawful arrests and arbitrary detention. Although technically an independent entity, the Ombudsman's office was expected to submit annual reports to Parliament. The State party was committed to the promotion and protection of human rights and would therefore

consider the recommendations concerning the establishment of independent national human rights institutions set out in the Vienna Declaration and the African Charter on Human and Peoples' Rights in due course.

10. On the issue of constitutional exceptions to the principle of non-discrimination (question 4), section 15, subsection 4, of the Constitution stipulated that a law would not be regarded as discriminatory insofar as it made provision with respect to persons who were not citizens of Botswana and with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. In order to regulate the employment and other remunerated or profitable activities of individuals who were not citizens, Parliament had passed the Employment of Non-Citizens Act, which required such persons to obtain work permits before engaging in any activity for reward or profit. The Abolition of Marital Power Act of 2004 provided for equality between spouses by abolishing discriminatory common law provisions. The promulgation of that Act had served to endorse the right to equal protection under the law afforded to every citizen pursuant to article 3 of the Constitution.

11. **Ms. Mogami** (Botswana), in answer to question 5, said that while customary law continued to be implemented, the State had empowered women through legislation. Women were now able to acquire and dispose of property as and when they wished, without being required to refer to a guardian. An interpretation of the Abolition of Marital Power Act, to the extent that it dealt with immovable property, protected women's property rights.

12. **Mr. Makgonatsotlhe** (Botswana) said that the law in Botswana criminalized same-sex sexual activity (question 6) because the nation viewed such sexual acts as immoral. Botswana considered as *contra bonos mores* that which the nation traditionally held as contrary to traditional and religious beliefs.

13. **Mr. Skelemani** (Botswana), referring to question 7 on the list of issues, pointed out that article 6, paragraph 2, of the Covenant recognized that capital punishment existed in some countries; therefore, the only point open to discussion was the types of crimes that were serious enough to warrant the death penalty. In the courts, the death sentence could not be pronounced against any person under the age of 18 or against pregnant women. Such a sentence could be imposed in the case of premeditated murder, as it often involved people taking life in order to improve their own circumstances. Another instance in which the death penalty was justifiably imposed was ritual killings, in which a person's organs might be removed while the victim was still alive. Upon consultation, the citizens of Botswana had expressed a preference for maintaining the death penalty. Therefore, the issue of capital punishment must continue to be debated until the majority in Botswana was of the view that it should be abolished; until then, the law would be applied as it stood.

14. Regarding the prerogative of mercy, he observed that every murder case had to be submitted to the Court of Appeals, as the highest court in the land. If a death sentence was pronounced, the case was then referred to the President of Botswana. The President based his decision on the advice of the Advisory Committee, whose consultations involved asking the judge who had tried the case whether there were any grounds for diminishing the convicted person's moral responsibility, other than any extenuating circumstances. Only if there was no such extension would the President sign the order for execution.

15. Turning to question 8 on the list of issues, he said that while there was no constitutional authorization for any form of punishment resembling torture, section 7, paragraph 2, of the Constitution did authorize punishment that had been lawful in Botswana immediately before its entry into force. However, that matter was also open to debate and Botswana looked forward to further discussion on the topic.

16. The decision in *Clover Petrus and Another v. State* outlawed the imposition of corporal punishment in instalments. In other words, the decision objected to the manner in which corporal punishment was administered, but did not have the effect of abolishing its application in general; corporal punishment thus remained lawful in Botswana.

17. **Mr. Makgonatsotlhe** (Botswana), responding to question 9, said that the Prisons Act prohibited any form of ill-treatment of prisoners. Section 46, paragraph 1, of that Act laid down officer-related offences, some of which directly addressed the issue of ill-treatment, for example, unwarranted personal violence against any person in custody. Prisoners alleging ill-treatment could lodge complaints with the competent Minister, prison officers, visiting judicial

officers or the prison inspections committee. Officers accused of ill-treating prisoners were required to appear before a Board of Enquiry, whose purpose was to establish the facts of the case and to recommend disciplinary action, if necessary. The Board of Enquiry was independent and, as such, could conduct a fair investigation; its recommendations were consistently acted upon. Data on complaints and their outcome existed and would be provided in written form in due course.

18. **Ms. Mongwa** (Botswana), turning to question 10, said that domestic violence as such had not been legally defined in Botswana, although acts of violence, such as assault or inflicting grievous bodily harm, were prosecutable offences. As a result, separate statistical data on domestic violence were not currently available.

19. There were a number of governmental and non-governmental organizations that dealt with violence, although not necessarily specifically with domestic violence. Examples included the Botswana Police Service, the Department of Social Services and the Women Against Rape Association, which provided counselling, among other things. To better address the issue of domestic violence, a Domestic Violence Bill had recently been passed by Parliament and was expected to receive presidential approval in the near future. That was a positive development, as the Bill not only defined domestic violence as a criminal offence, but provided comprehensive legislation to protect and seek justice for victims. It also meant that in future statistical data would be available on the occurrence of domestic violence.

20. **Mr. Mokgothu** (Botswana), responding to question 11, said that the law in Botswana allowed the police to hold a person in custody for a maximum of 48 hours; a warrant had to be obtained for any detention beyond that limit. There were no data on the average length of pre-trial detention. Furthermore, everyone, including indigent persons, had the right of access to a lawyer.

21. Overcrowding in prisons (question 12) was a major problem in Botswana. The current total capacity of prison facilities was 3,994 prisoners, but as at November 2007, there had been 6,042 prisoners, including remands. The prison population included 4,626 convicted males and 115 convicted females. Efforts were being made to correct the situation by building additional cells, which would reduce overcrowding by at least 10 per cent for the period 2007-2010. Another measure being considered was the introduction of community service orders as part of the judicial sentences.

22. **Mr. Skelemani** (Botswana), in answer to question 13, said that hitherto Botswana had had no reason to consider that the current visiting time of 20 minutes was inadequate. He pointed out that communication through correspondence was separate from that restriction.

23. Under Botswana law, the bodies of condemned prisoners were buried in the prison yard, as it was believed that asking the executed prisoner's relatives to collect the body themselves would be excessively distressing for them, especially given the condition of a body after execution. In the past, very close family members had in fact been informed of the date of scheduled executions, but as a result, the prison service had been inundated with requests to change the date, for reasons of convenience. Therefore, considering that the law did not stipulate that families were required to be informed, the State had decided to discontinue the practice. In his long career, he had not met many individuals who would seek to have that information; indeed, a typical Botswana national would not see any point in collecting a prisoner's body once the execution had been carried out. On that issue also, however, Botswana was not closed to discussion and would certainly give consideration to the idea of allowing last visiting rights to a convict's family prior to execution.

24. **The Chairperson** invited the members of Committee to raise questions with the delegation.

25. **Mr. O'Flaherty**, noting with concern the reservations made to articles 7 and 12 of the Covenant, said that the reservation to article 7 was particularly unusual in the light of Botswana's democratic achievements, as it suggested that the State party wished to take a position contrary to established prescriptive norms of international law regarding the prohibition of torture. At the time of Botswana's ratification of the Covenant, two States parties had considered the reservations to be illegal given their wide scope. He wondered whether the Government of Botswana would consider withdrawing those reservations at the earliest possible opportunity.

26. Notwithstanding the fact that the initial report had been submitted late, precluding a dialogue with the Committee for a number of years, the report was

informative, consistent with the reporting guidelines and, on occasion, self-critical. However, more information on the actual situation on the ground rather than on the legislative framework in a given area would have been helpful. For example, it would have been useful to have more disaggregated data, particularly on issues relating to articles 2 and 3. The report failed to discuss certain issues of great interest to the Committee such as the world-wide problem of human trafficking, which States parties typically addressed under article 8. Some sections of the report were very short, such as those concerning the implementation of articles 17 and 27.

27. Noting that the incorporation of the provisions of the Covenant in domestic legislation helped States parties to implement the Covenant effectively, he wondered whether the Government would reconsider directly incorporating those provisions in Botswana law. A number of States with dualist legal systems such as his own country, Ireland, had recognized the need for such action. For example, Ireland had incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms into domestic law. There were some incompatibilities between the constitutional framework of Botswana and the provisions of the Covenant, for example regarding the grounds of non-discrimination. There seemed to be a general lack of awareness of the Covenant within the judiciary and the legal profession. The Covenant had been cited in only one or two domestic cases. He therefore suggested targeted professional educational programmes concerning the Covenant for judges and lawyers; there were many regional human rights capacity-building and education programmes to assist in such endeavours.

28. In question 2 of the list of issues, the Committee was not proposing the integration of international human rights law into customary law. Customary law was very complex and fulfilled valuable social functions for which international treaties were not designed. Nevertheless, that unwritten body of law must be applied in a manner which did not violate the human rights of the people of Botswana under the Covenant. The Government should therefore consider raising awareness of the Covenant among the practitioners of customary law and devising methods of oversight to ensure that no procedures violated it. The question of whether the local police took into consideration the rights protected under the Covenant had been raised because, technically, they were officers of the customary courts according to the report. As the role of the local police in promoting human rights was crucial, he would appreciate information on relevant awareness-raising activities.

29. He noted with concern the limited scope of competence of the Office of the Ombudsman. For example, it could not deal with complaints about current or former office-holders or the police or measures to protect the security of the State. Noting allegations from non-governmental sources that the Office did not always act in an independent manner, he said he would welcome the views of the delegation on the alleged constraints on its authority. Information was also needed on the extent to which the staff of the Office were equipped and trained to guarantee the rights under the Covenant. Lastly, he urged the delegation to consider the possibility of establishing a national human rights institution in accordance with the Paris Principles, as proposed by the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child.

30. **Mr. Iwasawa**, commending the Government of Botswana on the submission of its initial report, said that the country had had considerable success in nurturing economic prosperity, political stability and democracy. With respect to question 4 on the list of issues concerning exceptions to the principle of non-discrimination, he referred to section 15 of the Constitution, which stated that no law would make any provision that was discriminatory either of itself or in its effect. However, in accordance with its subsection 4 (b), that provision did not apply to persons who were not citizens of Botswana. While the Employment of Non-Citizens Act referred to by the delegation in its written responses to the list of issues was important, it covered only employment and did not address other human rights areas. He would like to know whether asylum-seekers and refugees enjoyed the human rights guaranteed under the Constitution and the Covenant. He also noted with concern that subsection 4 (c) made an exception to the principle of non-discrimination with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. While the Abolition of Marital Power Act was indeed a milestone, it did not address the foregoing exceptions and excluded a wide range of areas from the principle of non-discrimination. He asked the delegation to respond to the concerns raised

over section 15, subsection 4 (d) of the Constitution, which made exceptions to the principle in the case of members of a particular race, community or tribe of customary law. He also drew attention to article 26 of the Covenant concerning protection against discrimination on grounds including race, colour and national origin. Clarification was also needed on subsection 9, which authorized the implementation of the discriminatory laws in force.

31. He noted with concern that customary law might be applied in a manner inconsistent with the Covenant. According to the report, neither the Marriage Act nor the Matrimonial Causes Act applied to marriages contracted under customary law. It was unclear whether the Abolition of Marital Power Act applied to such marriages. He would like to know how marriages under customary law were regulated and which laws applied to them. Information was needed on how equality between men and women was guaranteed in customary marriages. He further asked whether the Government of Botswana planned to take steps to prohibit polygamy under customary law. Clarification was needed about the provision under customary law by which custody of children in cases of separation or divorce was granted to the father's family and the mother only had visiting rights. Noting that property disputes between cohabitants were no longer dismissed by the customary courts as often as in the past, he enquired whether such disputes could be heard in other courts. He also asked what steps had been taken to address the lack of legal capacity of women under customary law mentioned in the report, whereby unmarried women were subjected to the guardianship of their fathers, brothers and uncles and married women to their husbands. He noted with concern the requirement under the Constitution, which applied only to women, that for the purposes of establishing jurisdiction in matrimonial cases a wife must be resident in Botswana for a continuous period of three years immediately preceding the date of the institution of proceedings. It was not clear how the difference in treatment between men and women was justified. He commended the decision by the High Court in the *Unity Dow v. Attorney-General* case, as it had helped the Government of Botswana to eliminate gender discrimination in its law on citizenship. He would like to know how the National Gender Programme Framework referred to in the report had enhanced the status of women.

32. While he recognized the scale of the problem of HIV/AIDS which the Government of Botswana was facing, that was no justification for criminalizing same-sex sexual activity. He recalled the Committee's views on Communication No. 488/1992: *Toonen v. Australia* (CCPR/C/50/D/488/1992 (1994)), in which the Committee had noted that the criminalization of homosexual practices could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS and concluded that such a law was in violation of article 17 of the Covenant. It could be argued that it also amounted to discrimination based on sexual orientation, in violation of article 26.

The meeting rose at 1 p.m.

United Nations CCPR/C/SR.2516

International Covenant on Civil and Political Rights

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Human Rights Committee
Ninety-second session

Summary record of the 2516th meeting
Held at Headquarters, New York, on Wednesday, 19 March 2008, at 3 p.m.

Chairperson: Mr. Rivas Posada

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08-27643 (E)

The meeting was called to order at 3.10 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Initial report of Botswana (*continued*)
(CCPR/C/BWA/1; CCPR/C/BWA/Q/1)

1. *At the invitation of the Chairperson, the members of the delegation of Botswana took places at the Committee table.*

2. **Mr. Khalil**, referring to the fairly low number of commutations from death sentence to life imprisonment, requested more information on the death penalty and the law of commutation. It was important that the work of the Advisory Committee on the Prerogative of Mercy be transparent in view of the fact (CCPR/C/BWA/1, para. 147) that many poor accused persons did not have the means to pay for legal counsel and did not receive the assistance to which they were entitled under article 14 of the Covenant.

3. Turning to Botswana's reservation to article 7 of the Covenant, he expressed the hope that the delegation, on its return home, would explain the importance attached by the Committee to serious consideration of the withdrawal of that reservation. In 2005, the African Union Mission had also raised the issue of corporal punishment, expressing the view that it was degrading and inhumane. Corporal punishment was also a violation of article 10 of the Covenant. Surprisingly, officials had sought to justify it, arguing that it was more effective than imprisonment and that many people in fact preferred it to imprisonment. Community service, an alternative suggested by the African Union, had been tried but had failed because there were not enough officials to supervise offenders. He urged the authorities to address the lack of supervision.

4. Turning to question 9, he welcomed the Government's intention to provide statistics on complaints of torture and ill treatment by police and prison staff in the not too distant future. Referring to paragraph 178 of the report, he said that the mechanism for "normally" interviewing arrested persons did not seem to be adequate. There should be a clearer and more effective mechanism for investigating allegations of torture under any circumstances. It was not made clear (para. 185) how or to whom alleged victims of torture could make their complaints while in custody and who would be authorized to conduct the investigation in such cases. The composition of the investigating team was not specified. If the police were implicated in such accusations, he wondered whether there would be police officers in the team and if so, how the investigation could be independent.

5. According to paragraph 158 of the report, torture was not an offence as such, but the elements leading to it were offences. He asked whether the State Party would consider adopting the definition of torture set in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6. Turning to question 11, he wondered why not all requests to visit prisoners made by NGOs were granted. Referring to paragraph 221 of the report, he wondered what measures had been taken to clear the serious backlog of cases that prevented many cases from being heard within a reasonable time.

7. Turning to question 12, he wondered what measures were being taken to deal with prison overcrowding, apart from building new prisons, which was not necessarily the best solution. Releasing prisoners on bail was another way of reducing overcrowding.

8. With regard to question 13 on the list of issues, while he could understand the reasons given by the Minister for the measures taken, he reiterated the Committee's view that the secrecy surrounding the date of execution and place of burial had the effect of punishing the families of the executed persons and constituted inhumane treatment.

9. **Ms. Palm** thanked the delegation for its comprehensive report but noted that it mainly covered legislation rather than everyday practice. With respect to question 10, she welcomed the adoption of the Bill on Domestic Violence, which had previously been considered a private matter; often no action had been taken to protect the victims of domestic violence, who were mainly women. However, she would like to have more information on the content of the Bill and on the incidence of domestic violence in Botswana. Presumably the Bill had been introduced because domestic violence was considered a serious problem, as it was in most countries.

10. There seemed to be a growing awareness of violence against women and measures taken by the police included paying more attention to threats made by partners. She would welcome more information on

any concrete steps, other than legislation, being taken to prevent domestic violence and provide help and redress to victims. The Committee would also welcome a copy of the Domestic Violence Bill.

11. **Mr. Amor** asked about the rank of the Covenant in the legal system of Botswana. The delegation should also explain the relationship between domestic and international law and, more specifically, domestic law and international human rights law. He had been concerned to learn from the report that customary law, (para. 62) was a function of patterns of behaviour within a particular community, which could make the integration of international conventions into the Customary Courts difficult. The Covenant had to be applied regardless of national structures or cultural practices, and the State had to ensure that it took precedence over domestic law. He looked forward to receiving more information from the delegation with regard to the compatibility of customary law with the Covenant.

12. He wished to know what initiatives or actions had been taken by Botswana to prevent and eradicate ritual murder. There was no possible justification for such murders and he would welcome more information on the sociological context, the attitude of the State and existing sanctions and preventive measures.

13. **Mr. Lallah** expressed concern about the application of article 14 of the Covenant regarding the right to a fair trial and sought clarification regarding the jurisdiction of customary courts. He wished to know whether customary courts could impose heavy fines or send people to prison and whether there was a limit to their competence in such matters.

14. He was perplexed by the application of fundamental human rights provisions regarding the equality of rights of men and women. Referring to sections 3 and 15 of the Constitution, which dealt with non-discrimination, he asked whether the term "person" included both men and women, as the provisions referred only to "he", and whether women were in fact considered non-persons, since a number of provisions seemed to allow the State to make discriminatory laws. He wondered how the courts in Botswana had interpreted those two provisions. He also asked whether a woman could be President of Botswana, and whether women could be included in the House of Chiefs, and if so, how many women were chiefs. As the House of Chiefs had important powers regarding the designation, recognition and removal of powers of chiefs and the administration of customary courts, customary law, tribal organization and tribal property, it was very important that women not be excluded.

15. Paragraphs 49 and 51 of the report referred to the courts and the Judicial Service Commission. The Chief Justice, who was President of the High Court, seemed to have a higher status than the President of the Court of Appeal in view of the order in which they were listed. He wondered who had priority in practice as it seemed unusual that the judge who would decide on an appeal against a High Court judgement was not senior to the judge of that court.

16. **Ms. Wedgwood** said she assumed that women's guardianship was only a customary law practice. Customary law, however, had to be measured against the Covenant in the same way as statutory and common law were, despite any problems of implementation, persuasion or enforcement. In many countries, it was customary law that had the greatest force in practice.

17. With regard to the death penalty, the family of the executed criminal should at least be given the option of having the body returned for burial. There was surely no intention to inflict further pain on the family by denying them the opportunity to mourn at the graveside. As mistakes with the death penalty could not be corrected, the expectation of due process was exceptionally high. The fact that there was inadequate legal representation for condemned persons in capital cases was a good reason for suspending the death penalty, at least until that situation was remedied.

18. In the Committee's view, the principles of equality referred to sexual orientation as well as gender. Even if homosexuality was against the law in Botswana, homosexual practices inevitably occurred in prison and if the country was serious about combating HIV/AIDS, condoms would have to be made available there. Some prisoners were in a very vulnerable situation and might not have the option of refusing sex. Even Bishop Belo of Timor, although Catholic, had condoned the use of contraceptives for epidemiological reasons.

19. She asked whether there were any women among the *dikgosi* (traditional tribal leaders). As the State conferred juridical status on the *dikgosi*, it could ensure that women were allowed to participate, which was also a requirement under the Convention on the

Elimination of All Forms of Discrimination against Women. Women were crucial to the economy, and acknowledgement of their leadership in politics could also have spillover effects on how they were treated in the home. It was therefore very important for Botswana that they participate in the exercise of customary traditional power.

20. **Sir Nigel Rodley** strongly urged the State party to reconsider the need for its reservation to article 7, paragraph 3, of the Covenant, for it did not do justice to Botswana's otherwise serious approach to its obligations. The reservation was shockingly wide for such a limited purpose; it fell foul of article 7, did not take account of the *ius cogens* nature of article 14, and would not protect Botswana in any case.

21. As concerned the death penalty, the useful figures given in paragraph 151 of the report, though inconsistent, indicated that on average there had been one execution per year. It should therefore not be hard for the delegation to provide more detailed statistics, such as the number of sentences and of actual executions year by year, which would then allow the Committee to assess the extent to which extenuating circumstances had been applied by the courts or judge the dimensions that had made some capital cases non-mitigable. He also wondered if the single commutation in 1975 (report, para. 153) had been the only application of the prerogative of mercy since 1966. The delegation had stated that Botswana envisaged abolition of the death penalty when the public was ready. That meant that it would never happen, for public opinion, everywhere, only followed political leadership. The death penalty used to be the norm in Africa but, from south to north, that had gradually changed, and Botswana now looked like an island of retention in a sea of abolition, hardly consistent with its good governance. If it was holding on to the death penalty because of its deterrent value, most studies, including those done by the United Nations, had disproved any deterrence. He urged the State party to give more reflection to the actual merits of capital punishment.

22. **Mr. Skelemani** (Botswana), observing that democracy and dogmatism were incompatible, said that he did not propose to defend a position simply because his Government had taken it. He had been impressed by the Committee's comments and appreciated the high purpose of the Covenant. There could still be honest differences, but the debate must continue, to mutual enlightenment, for Botswana was not interested in condemning its people to what was less than ideal.

23. His Government, noting that there was no definition of torture in the Covenant itself, had not made torture per se a crime. However, as the report suggested (para. 158), any severe physical or psychological maltreatment or unacceptable condition that could be considered an element of torture had, indeed, been made a crime under either the Penal Code or various pieces of legislation. None of those elements were labelled torture, but they were nonetheless proscribed. One must look at the individual statutes to know how Botswana was protecting those deprived of their liberty from ill treatment.

24. It had been an omission not to deal with human trafficking in the report. He believed it did exist, for arrests had been made, mainly in the east, on the border with South Africa. His Government was aware through INTERPOL and the Southern African Development Community (SADC) police chiefs that it was occurring and it was on the lookout for it.

25. The brevity of the initial replies to the list of issues was due to a misreading of the instructions. The delegation understood that it was essential to give the Committee as much truthful information as possible.

26. It was true that not all international treaties to which Botswana was a party had been incorporated into domestic law, as required by the Interpretation Act. That dual approach had been taken in part because it had not seemed necessary to give the force of law specifically to treaties that did not differ from Botswana's own Constitution.

27. It was clear that the Covenant bound a State party, and that neither customary nor common law could be exempted from that obligation. Botswana had therefore continued to amend or adapt legislation that would in the process modify aspects of the customary law — which was an unwritten law basically the same from tribe to tribe, although with nuances — but without making a public issue of the fact. Botswana had decided to take a gradualist approach to avoid provoking an uproar over interference with the rights of the communities; the dilemma in politics was always the management of conflicting desires of the people and of the international community. He asked the Committee to accept the fact that his Government was aware and wanted to move the people along.

28. For instance, in order to improve the status of women under customary law, and to give them property rights, Botswana had quietly made the acquisition of land available to every unmarried woman over the age of 18, and required men to show proof of their wives' consent before transferring land, and no one had contested that. The Government now needed, however, to encourage women to avail themselves of their rights and the rest would follow. It was also seeking to educate women not to accept polygamy, although in that area Botswanans themselves had realized that it was no longer financially practical to marry many wives and were themselves moving away from custom. The obvious inequality of the sexes under customary law would have to change, especially by enlightening the women themselves and the younger generation, which was already becoming less traditional.

29. The report was not up to date on the Marriage Act and the Matrimonial Causes Act (paras. 382 and 397): recent legislation had repealed the residency requirements for women filing for divorce before the High Court and made the legal capacity of women under common law equal to that of men. In the case of customary marriages, applications for divorce were made to the local chief, without going through the courts. One area, however, that was not properly regulated was cohabitation, and action still remained to be taken on a 2003 report on the question by a parliamentary committee. In all instances where customary and common law overlapped, there was no question that customary law would eventually have to be brought in line, and the touchstone would always be the Unity Dow judgement handed down in 1992 by the High Court (report, para. 104).

30. The office of the Ombudsman had been established because there had been too many complaints about badly administered government services. The Ombudsman acted independently and could investigate what he chose; and he had, indeed, challenged actions by the executive branch. A national human rights body would also be very useful, but it was not inexpensive to establish one and there would be no point in setting up an institution in name only. The time for such a move had to be right, and such a body should cover the gray areas not dealt with by the Ombudsman or the courts.

31. On the question of discrimination, sections 3 and 15 of the Constitution were indeed derogations from rights, but that did not mean that the Government had ever actually taken any such action depriving its people of basic rights. In the area of employment, there was no question that the Government wanted to promote the well-being of its own people before that of non-citizens in areas where there were enough Botswanan workers. The Government did, however, recognize that skilled refugees who had fled their own countries had to be allowed to have gainful employment in Botswana and help in running the economy.

32. The Government had not set up any courses to teach members of the judiciary or the police force about the provisions of the Covenant and other international human rights treaties, which in any case had to be applied because they were the law of the land. Courses, however, were available within the region, and Botswana would send as many of its judges and law enforcement officials as it could to attend them. Botswana itself had an excellent Police Academy open to all Africans, which was receiving international assistance and should eventually be in a position to set up human rights courses.

33. Turning to question 6 on same-sex relations, he said that their prohibition predated the HIV/AIDS pandemic, and citizens of Botswana opposed such relations on moral grounds. It was undeniable that the disease would be transmitted through the practice of sodomy if condoms were not provided to male prisoners. He acknowledged the contradiction between the Government's wish to prevent the spread of HIV/AIDS and its refusal to make condoms available to prisoners.

34. Turning to question 7 on the death penalty, he noted that there had been many capital cases in Botswana's 42-year history. However, from 1973 onwards, dating back to his involvement with the courts, extenuating circumstances had been found in 99 per cent of cases and the courts had refused to impose the death penalty. As a result, few cases were brought before the Advisory Committee on the Prerogative of Mercy because once an extenuation was granted, cases could not be sent elsewhere. The quality of legal representation available to those sentenced to death remained an issue. There had been cases of lawyers who did not consult the client properly, and he wondered whether a higher fee would motivate an unprincipled lawyer to act ethically. It remained unclear whether the country's legal system would

allow convictions and death sentences without a thorough examination of the facts in cases involving well-trained judges and poor lawyers. Legal representation for the poor was available when individuals were charged with a criminal offence before the High Court. Pro deo counsel was granted in cases of potentially long sentences or the death penalty. The delegation had attempted to indicate how the Advisory Committee on the Prerogative of Mercy worked. It did not operate by seeking information not previously considered in the court, but rather by attempting to understand how the individual on trial could have committed the crime in question, without that understanding serving to justify the crime as such.

35. Turning to Botswana's reservation to article 7 of the Covenant, he noted that the purpose of section 7 (2) of the Constitution was to preserve the forms of punishment that had been lawful in the country before independence, including corporal punishment which he deemed preferable to imprisonment, as the latter created hardened criminals. He disagreed with those who believed that corporal punishment had no place in a civilized society. In his experience, it could be beneficial in moderation, since its purpose was to correct, never to kill. The issue of substituting community service for corporal punishment remained an open question. Jails in the country were currently full. Those who perceived corporal punishment as barbaric should understand it in the context of the particular society. However, future generations might take a different approach to the matter.

36. With regard to question 9, concerning complaints of ill treatment brought against police and prison staff, he wondered whether a Board of Enquiry could independently establish facts regarding a case of police brutality if there were police officials serving on that Board. He had been raised to believe that there were upright police officials who would deal with wayward ones. In a number of cases, police officials had been prosecuted for criminal offences. Nevertheless, there might be members of the Board who would try to protect rogue colleagues. In certain cases, independent investigators would be hired to work on cases. He understood the use of the word "normally" in paragraph 178 of the report to mean that complaints would be investigated and persons would be informed of their rights.

37. A copy of the Domestic Violence Bill would be made available to the Committee. The Bill had made considerable progress towards addressing not only physical assault but also the psychological trauma suffered by spouses. The conduct of some citizens of Botswana had left much to be desired and that had led to the unanimous adoption of the Bill. In order for it to be effective, it was critical that non-governmental organizations should educate people, particularly women from a customary law background who assumed that they were powerless because men were the head of the household, on their rights.

38. In the Botswana legal system, customary law was rendered void wherever it conflicted with common law. The Covenant was meant to cover all matters within the republic, and customary law could not be an exception. Furthermore, customary law was fluid in that it relied not on statutes but on the common understanding of the community — thus, if a particular provision was outdated, the community's behaviour was sufficient to change it. A more proactive leadership was required to amend customary law more rapidly.

39. The practice of ritual murders resulted from the belief of some citizens that removing human body parts while the victim was alive and mixing the parts with herbs would confer greater strength and privilege upon the person who ingested the mixture. He expressed his abhorrence of that cruel practice and was prepared to have any perpetrator of such crime hanged. On whether hanging served as a deterrent or just as revenge, he wondered who would avenge society if the living did not. Other forms of punishment, such as imprisonment of thieves, had not deterred others from perpetrating theft. While no study had been conducted on the deterrence value of executions, people in South Africa had been known to comment that the perpetrators of ritual murders in that country should be sent to Botswana to be hanged.

40. Referring to customary law, he said that, since it was applied to the majority of the population, it should be brought in line with all the country's treaty obligations. Jurisdiction in customary courts was by warrant, and they could try certain crimes but not others. Some found that customary courts sent too many people to prison.

41. In section 15 of the Constitution, it was stated that reference to persons as "he" meant both men and women, and new legislation used both male and female pronouns. In certain tribes, women could be chiefs, and women could be appointed to the House of Chiefs by

the President. Given the increasing involvement of women in all sectors of public life, it was quite conceivable that a woman could become president of Botswana.

42. The Chief Justice was responsible for the day-to-day running of the judiciary, ensuring that courts were built and magistrates appointed. As the Chief Justice was in charge of the judiciary, the position was higher in rank than that of the president of the Court of Appeals — combining both positions would require an amendment to the law.

43. **Mr. O'Flaherty** welcomed the delegation's admission that, like most countries, Botswana faced the problem of trafficking in persons and invited the delegation to provide additional information on how the Government was addressing the problem. Consideration should be given to ways of balancing a punitive approach to trafficking with a focus on the rights of the victims that would include the ministries with responsibility for social welfare and children.

44. He also welcomed the information that human rights training was being provided to the police and members of the judiciary. The Government might wish to approach the Office of the High Commissioner for Human Rights (OHCHR) with a request for assistance, either directly or through the relevant national and regional bodies. The delegation had stated that the Government was willing to consider establishing a human rights commission but was concerned at the costs involved. Such an initiative, provided that it was pursued in accordance with international standards, was a worthwhile investment for a democracy and another area in which OHCHR might provide guidance.

45. Botswana's reservation to article 7 of the Covenant was worded so broadly and vaguely that it appeared to refer to an area of jus cogens, making it automatically void, and gave the impression that the Government was claiming the right to perpetrate torture with impunity. High priority should be given to withdrawing the reservation in order to remove an unnecessary stain on the nation's reputation.

46. **Mr. Iwasawa** said he took note of the delegation's statement that section 7 (1) (b) of the Matrimonial Causes Act had been repealed and that the Government was willing to review the criminalization of same-sex sexual activity.

47. The Covenant did not prohibit policies that made distinctions based on nationality, provided that the policies had a legitimate purpose and that the distinctions were proportionate thereto. However, section 15 (4) of the Constitution, which established that the prohibition of discrimination did not apply to non-citizens, constituted a violation of the Covenant. Many of that instrument's provisions applied to all people, regardless of their nationality; for example, article 7 stated: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

48. **Mr. Amor** asked how many ritual murders had been reported during the past three years and whether the delegation believed that the actual number of such crimes was higher. The delegation had stated that the act was criminalized; he wondered how the media dealt with ritual murder and what the Government was doing to change the traditional attitudes that prompted it through awareness-raising campaigns, school curricula and training programmes.

49. **Mr. Skelemani** (Botswana) said that children were the primary victims of human trafficking, although women and men were also being trafficked across the country's eastern border. There was no national programme specifically targeting the problem, but police commissioners had been instructed to be on the alert for it. His Government would explore the possibility of assistance from OHCHR, including with a view to the establishment of a human rights commission.

50. He realized that Botswana's reservation to article 7 might be viewed as touching on a matter of jus cogens. However, it was his understanding that its withdrawal would require a prohibition of corporal punishment, which, although it had elements of torture, was an established and highly beneficial practice that kept people out of prison.

51. His delegation hoped to be able to provide the Committee with the text of the revised section of the Matrimonial Causes Act at the next meeting.

52. The exemption of non-citizens from the Constitution's prohibition against discrimination was meant to ensure that Botswana's citizens always came first in their own country. No government allowed non-citizens to compete with its citizens for scarce jobs.

53. He did not have statistics on the number of ritual murders during the previous three years, but there had been few such cases. One problem was that in the absence of clear proof that a murder had occurred, it was not a crime to be found in possession of human body parts. Moreover, many reports of such crimes were subsequently disproved. Even educated persons and Christians — including bishops — had been known to engage in ritual murder. No awareness-raising efforts were currently under way, but perhaps a focus on the younger generation would wean the population from the widespread belief in its efficacy.

54. **The Chairperson** invited the delegation to reply to questions 14 to 21 on the list of issues.

55. **Ms. Mogami** (Botwana), replying to questions 14 to 16, said that the President could appoint judges only on the basis of recommendations by the Judicial Service Commission, an independent body. Judges had full security of tenure under the Constitution and were subject to mandatory retirement at age 70. Their salaries were established by Parliament and could not be altered to their disadvantage during their service. They could be removed from office for inability to perform their functions, but only on the recommendation of a tribunal appointed by the President, which must include at least two current or former judicial officers. Judicial officers were immune from lawsuits by persons involved in cases over which they had presided. They had good pensions and received substantive perquisites and solid clerical and administrative support. All High Court judges were equal. They were ex officio members of the Court of Appeal and could be called upon to serve on it.

56. Indigent persons facing capital punishment were provided with high quality pro deo counsel; an ongoing study was considering the establishment of a legal aid system.

57. The Customary Courts Act listed the offences over which those courts had no jurisdiction, including, inter alia, treason, murder, bigamy, bribery, extortion and rape. Legal representation was not permitted because advocates were likely to complicate the proceedings by submitting arguments based on provisions of common law that were beyond the comprehension of the customary courts' presiding officers. However, individuals who wished to have legal representation could apply to the Customary Court of Appeal for transfer of their cases to the magistrates' court. If that request was refused, the individual could apply to the High Court, citing denial of the right to legal representation. Such transfers did occur, but only where the individuals concerned were aware of their rights in the matter. The legal process ran from the lower customary courts to the higher customary courts and thence to the Customary Court of Appeal. Further appeals lay with the High Court (a common law court) and the Court of Appeal, which was the supreme court of the land.

58. **Mr. Outlule** (Botswana), replying to questions 17 to 19 on the list of issues, said that Botswana had made considerable progress since its independence; it now had at least nine private newspapers, apart from the free official newspaper. Indeed, the newspapers had a wider circulation than the Government newspaper. The National Broadcasting Board had licensed three private radio stations in addition to the two public stations, Radio Botswana 1 and Radio Botswana 2. The nation's television station, GBCTV, had had financial problems but was now on a stable footing, and online news services functioned without Government interference.

59. Section 12 (1) of the Constitution governed freedom of expression. It covered the public and private media, which enjoyed a wide latitude of freedom provided that they did not violate the rights of others. In a 2001 legal case, the court had established that private newspapers and radio stations were free to express their views and had recognized that that freedom was vital in a democratic society. The court had ruled that the Government's withdrawal of advertising patronage from the applicant's newspapers amounted to infringement of their freedom of expression since the sole reason for that withdrawal was the Government's displeasure at what it perceived to be irresponsible reporting. Many of the nation's young journalists were quite forthright in expressing their views, yet no journalist had ever been barred from the profession under the Penal Code.

60. Botswana recognized two types of marriage. Because common law marriages were registered, it was easy for the authorities to verify that the minimum age of marriage was met. However, customary law marriages were not registered and followed the practices of the different ethnic groups. The Marriage Act was being amended in order to ensure that all marriages would be registered and that the ages of the prospective partners would be verified.

61. **Ms. Mogami** (Botswana), speaking in reply to question 20 on the list of issues, said that polygamy was prohibited under common law but condoned under customary law. The Government had not yet initiated debate with a view to a total ban on the practice. Unmarried women had full legal rights and their status had been improved through the 2004 adoption of the Abolition of Marital Power Act, which had abolished the common law principle of marital power and given spouses married in community of property an equal right to dispose of their joint assets. Guardianship of unmarried women was a cultural practice of many ethnic groups; the Government was monitoring the process of social transformation in that area.

62. **Mr. Mokgothu** (Botswana), replying to question 21 on the list of issues, said that Botswana's meagre public resources as a developing country must be allocated to high priority areas of direct value to the majority of its citizens. The Government considered that public funding of political parties would cause them to proliferate and would not benefit the general public in any way. However, that issue was still under discussion. Political parties had access to the public media, including print, radio and television. In most cases, a schedule was prepared in order to give as many parties as possible an opportunity to present their platforms to the public. There was wide and unprejudiced coverage of party activities during political campaigns.

The meeting rose at 6 p.m.

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Human Rights Committee

Ninety-second session

Summary record of the 2517th meeting
Held at Headquarters, New York, on Thursday, 20 March 2008, at 10 a.m.

Chairperson: Mr. Rivas Posada

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This record is subject to correction. Participants wishing to submit corrections during the session of the Committee are asked to hand them, in typewritten form, to the Secretary of the Committee. A consolidated corrigendum of the summary records covering the closed meetings of the Committee will be issued shortly after the session.

08-27779 (E)

The meeting was called to order at 10.05 a.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Initial report of Botswana (*continued*)
(CCPR/C/BWA/1; CCPR/C/BWA/Q/1)

1. *At the invitation of the Chairperson, the members of the delegation of Botswana took places at the Committee table.*

2. **The Chairperson** invited the delegation of Botswana to continue its replies to points raised in connection with questions 22-25 on the list of issues (CCPR/C/BWA/Q/1).

3. **Ms. Mongwa** (Botswana), said the proportion of women among persons registered for elections had been 56 and 57 per cent respectively in 1999 and 2004. Out of 61 members of Parliament, seven were women, while in decision-making posts generally, in both the private and the public sectors, the representation of women was 41 per cent. Indeed, in both sectors, there had been significant advances in that respect in recent years, with women called on to serve, in particular, as Attorney-General, bank governors and ambassadors.

4. **Mr. Skelemani** (Botswana), taking up question 23, said that Botswana, like many other developing countries, had been faced with the challenge of redistributing its sparse wealth fairly and had for that reason framed a National Settlement Policy. The aim was to ensure through demographic regrouping that the majority of the people could benefit from necessary services and infrastructure, including schools, clinics, roads and water; people living in scattered locations within the Central Kalahari Game Reserve had accordingly been encouraged, not forced, to move out of the Reserve. National development was seen as a bottom-up process and was based on the *kgotla* system, whereby local communities were able to play a part in setting national priorities. The High Court judgement of 13 December 2006, referred to in the question, had centred on the issue of the cost of relocation, which had been challenged by the applicants; they had not appealed for clarification of the court decision regarding the Reserve, which still remained valid. Those who applied to return to the Reserve, including 30 persons who had not been on the original list of applicants, would be allowed to re-enter upon production of their national identity card but would have to provide their own water and other services, which under the court decision did not form part of the obligations of the Government. Game hunting permits could be requested as previously from the Department of Wildlife and National Parks, and indeed, they continued to be issued, outside the breeding period for the animals concerned. As for domestic animals, those currently inside the Reserve could remain there, but once taken out, they could not be reintroduced. In any case, all matters relating to the Reserve were more appropriately to be settled by negotiation under the *kgotla* system, not through the courts. That applied also to the question of the rights of the Basarwa, the majority of whom lived in settlements outside the Reserve: it had to be addressed directly with the people concerned, without the involvement of any outside organization. The Government considered that it was its duty to persuade all citizens to join the mainstream.

5. Turning to question 24, he said that some people had thought that the previous versions of the sections of the Constitution referred to were discriminatory and the Government had therefore amended them. That was but the beginning of what was bound to be a long process, since there was resistance from the members of some minorities who wished to hold on to what they regarded as their acquired rights. Under the new constitutional provisions, members of the House of Chiefs were to be elected by an electoral college composed of headmen, in other words, those entrusted with the office of *kgosi*, who were not necessarily tribal chiefs. In addition, the President appointed five of its members, and was using that power to ensure greater participation by women and underrepresented groups. It had been contended that each tribal community should be able to have its chief appointed to the House of Chiefs, but that ignored the problem of defining what constituted a tribe. The Basarwa, for instance, were scattered all over the country and some of them could not even understand one another. Chieftainship must contribute to the development of Botswana as a Republic; otherwise, it should not be taken into account. The Bogosi Bill accordingly repealed and replaced the Chieftainship Act, in particular so that the notion of tribal community would not be linked to that of a tribal territory. A citizen was entitled to apply for land by virtue of belonging to the people of Botswana, not to any given tribal entity; moreover, such entitlement was not limited either to a tribal territory or to the home area. The Republic had gone past the stage of fighting over tribal territories and, under the Tribal Territories Act, had made it

possible to recognize tribes, designate chiefs and give access to land without reference to any such territory.

6. Moving on to question 25, he said that while Setswana and English were the only languages formally used in schools, the Government had recognized that other languages spoken in the country should be brought into the curriculum. It had therefore revised its language policy in support of the teaching of local languages, starting at pre-primary level. Much depended on financing, however, particularly since there was no established orthography for some of those languages. Steps had begun to be taken towards that goal, on which there was general agreement, notwithstanding different views as to the possible pace of implementation.

7. **The Chairperson** invited the Committee to pose follow-up questions in connection with 14-25 on the list of issues.

8. **Mr. Khalil** said that he was grateful for the additional information on measures taken by the State party to guarantee the independence of the judiciary. It would be useful, however, to have confirmation that at least two members of the tribunal mentioned in paragraph 310 of the report were judges. On the issue of legal assistance, it was clear that although individuals charged with capital offences were entitled to *pro deo* counsel, the remuneration provided by the Government was not sufficient to attract suitably qualified lawyers. Furthermore, as a result of high poverty levels, many individuals accused of other crimes simply did not have the means to obtain adequate legal representation. He hoped that the study on legal aid referred to by the State party would be accorded priority attention with a view to ensuring that all citizens, including indigent persons, could enjoy the right to a fair trial enshrined in article 14 of the Covenant.

9. Referring to question 16 on the list of issues, he expressed concern about the uneven application of the Act regulating the jurisdiction and procedures of the customary courts, particularly since an estimated 85 per cent of all criminal cases were tried by such courts. The lack of awareness of the Act among the public at large and the fact that it had not been translated into Setswana or other local languages further hindered efforts to ensure respect for the provisions of article 14 of the Covenant.

10. **Ms. Palm**, referring to the freedom of expression (questions 17 and 18), enquired whether the three privately owned radio stations had the same broadcast coverage as the two State-owned stations. It would appear that Botswana had only one privately owned television station, GBCTV. It would therefore be interesting to have more detailed information about the criteria for awarding broadcasting licences to private companies; she would also like to know how many State-owned stations existed and the extent of their broadcast coverage.

11. The State party's reply to question 18 was insufficiently detailed. Since the provisions of section 90 of the Penal Code were rather vague, it would be useful to have some examples of cases in which it had been applied. Similarly, case law relating to the application of section 93 (1) of that Code on the use of abusive, obscene or insulting language in relation to the President or any public official should be provided. She was curious to know what constituted insulting language within the meaning of that article.

12. **Mr. Iwasawa** expressed concern that, since section 14 of the Marriage Act did not apply to unions contracted under customary law, persons under the age of 18 were in theory permitted to marry under the latter system. However, he welcomed the steps taken by the Government to amend the Act and to promote the registration of all marriages. With reference to question 20 of the list of issues, he stressed the importance of taking all necessary measures to ensure that customary law was not applied in such a way as to conflict with the provisions of the Covenant.

13. Turning to the issue of participation in public affairs (article 25 of the Covenant), he said that it would be useful to have more detailed information on the political situation in Botswana. Data on the number of political parties and their membership would be particularly instructive. Since the Government was not responsible for funding those parties, he wondered whether there had been instances of corruption involving private donors. Although women still accounted for only 11 per cent of the total number of parliamentarians, it was encouraging to see that, in absolute terms, their numbers had increased. Furthermore, it would appear that 7 of the 18 Cabinet ministers, or 28 per cent, were female. Additional information on the number of female judges, in particular those presiding over the Court of Appeal, prosecutors and lawyers, as well as the number of

women occupying decision-making and managerial posts in the public and private sectors, would be helpful.

14. With regard to the rights of persons belonging to minorities, it was unfortunate that the State party had been unable to provide statistical data disaggregated by tribe. Such data should be included in the second periodic report. The replies to question 23 on the list of issues suggested that the Government had not forced the residents of the Central Kalahari Game Reserve to relocate. However, he had received reports from other sources that those residents had been compelled to move because the Government had discontinued the supply of basic services to the Reserve. In that connection, more detailed information should be provided about the outcome of the fact-finding mission mentioned in paragraphs 279-282 of the report. He also wished to know whether section 14 (3) (c) of the Constitution, which made special provision for the Basarwa people, had been amended and, if so, whether the amendments had had an effect on the situation of the Basarwa people living in the Reserve. Further information on the living conditions of that group, both inside and outside the Reserve, would also be useful. Lastly, he commended the State party for its willingness to reach a negotiated solution to the problems connected with the Reserve.

15. **Mr. O'Flaherty** commended the State party for its desire to respect the rights of all the various ethnic groups living within its territory but pointed out that the lack of data disaggregated by tribe was a serious impediment to that endeavour. He was concerned that the ongoing negotiations on the establishment of a new House of Chiefs would be undermined by the need to accommodate vested interests, resulting in the persistence of the traditional distinctions between majority and minority tribes. More detailed information on that issue would be welcome. Concerns had also been expressed that the Bogosi Bill had not been the subject of widespread public debate. If that was indeed the case, it would be interesting to know whether the Government would reconsider its position on that question and hold public hearings.

16. As far as discrimination against particular ethnic groups was concerned, reports had suggested the existence of a bias against non-Tswana people. Indeed, according to his sources, 9 of the 12 Land Board secretaries in the country were Tswana, despite the fact that the Tswana people did not account for the majority of the population. He would be grateful for an explanation of that situation. The Committee had also received allegations of long-standing and widespread discrimination against the Wayeyi people, including the recent suspicious deaths of two successive Wayeyi chiefs. Not only had the police been unwilling to investigate those deaths, but the Government had not yet recognized the new Wayeyi chief. He would welcome the State party's comments on that issue. Lastly, while he commended the State party for its new approach to language teaching, it would be interesting to hear more about the alleged unwillingness of radio stations to broadcast songs in non-Tswana languages.

17. **Mr. Bhagwati**, referring to questions 14 and 15 on the list of issues, asked whether the recommendations of the Judicial Service Commission in matters relating to the misconduct of judges were binding on the President. The State party should indicate how many such recommendations had been made and what had become of them. While legal aid services were provided to individuals accused of capital offences, it was unclear from the report whether individuals accused of other crimes could avail themselves of such assistance. He would like to know whether any relevant legislation had been enacted; if so, a detailed account of its content should be supplied. It would also be useful to have an indication of the number of cases in which legal aid had been provided.

18. **Mr. Johnson**, returning to the issue of capital punishment, enquired as to the measures taken or envisaged to address the calls for a moratorium on the death penalty in Botswana emanating from regional and other organizations. He would also like to know whether the Government had taken any steps to change tribal chiefs' opinion on the death penalty with a view to achieving its abolition.

19. **Mr. Amor** said that he would be grateful for more information on the future participation of women in the new House of Chiefs. He would also like to know whether the proceedings of the House were governed by positive or customary law, whether it was empowered to make decisions or merely to issue recommendations and whether those decisions and/or recommendations were implemented by institutions constituted under customary law or State bodies. If the former, did the State have any role in monitoring their implementation?

20. The customary courts in Botswana did not seem to concern themselves with the guarantees set out in the Covenant. Since those courts dealt with both civil and criminal matters, it would be useful to know whether the State judicial machinery was competent to oversee their rulings and whether individuals dissatisfied with the findings of the customary courts could bring an appeal before the State courts.

21. The State party's policy of relocating individuals and groups from remote areas to more densely populated ones was perfectly legitimate because it facilitated the provision of basic social services. It was important, however, to ensure respect for the freedom of movement of relocated individuals and groups; he therefore enquired whether the former residents of the Central Kalahari Game Reserve were permitted to come and go from the Reserve as they pleased.

22. Lastly, referring to the issue of minority groups and languages, he said that ethnic diversity was a valuable asset, albeit one that was sometimes difficult to manage. Botswana had been subject to the yoke of colonialism for many years and was therefore seeking to forge a national identity based on the unity of its peoples. At the same time, however, it was cognizant of the need to respect the rights of all its ethnic groups. Every effort should be made to ensure that the enjoyment of collective rights did not undermine the exercise of the individual rights enshrined in both the Constitution and the Covenant.

23. **Ms. Wedgwood** said that there appeared to be a latent contradiction in the State party's arguments: Botswana sought to create national identity, yet the system of customary courts was kept separate from the ideals of justice that were part of the national identity. It was therefore necessary to transform the customary courts, difficult though that might be.

24. It was not clear why attorneys were not allowed to appear in customary-court hearings; rather than simply complicating issues, attorneys could help to educate judges about the law and clients about their rights, including those provided for under the Covenant. Such legal assistance was especially important in the case of vulnerable individuals, including illiterate persons or young women. Ultimately, attorneys might also play a useful role in developing customary law by making it more convergent with common law and the Covenant. Therefore, while not requiring the presence of attorneys might be understandable, forbidding their appearance outright seemed extreme. Moreover, individuals should be given formal notice of their right to transfer their case and there should be a written record of their waiver of that right.

25. While recognizing that the conservation of the Central Kalahari Game Reserve was important for the country economically, she said that it was not clear why the State party did not allow the Basarwa in the Reserve to use boreholes to access water, especially since bringing in water from outside the Reserve was extremely costly. Also, severe restrictions on hunting when hunting was the lifeblood of the people living in the Reserve should be open to question. If some individuals from the Reserve had won a case allowing their return to the Reserve, that right should be extended to persons in the same situation even if they had not been formal plaintiffs. In addition, it appeared needlessly harsh to prohibit people from bringing in livestock, such as goats, when their milk might serve as nourishment. Although the desire to carry out game management and to maintain the Reserve as a thriving tourist attraction was understandable, it was also important to preserve traditional ways of life; indeed, it might prove economically short-sighted to lose the traditional learning used to sustain such a way of life.

26. She asked whether Botswana had considered ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Such a step might be beneficial, as it would allow regional consideration of complaints, with direct recourse to that Court.

27. **Mr. Skelemani** (Botswana) said that judges could be removed only if they were unable to perform their duties for health reasons or had engaged in inappropriate conduct. Under section 97 (3) of the Constitution, if the President of Botswana considered that the question of removing a judge of the High Court ought to be investigated, he appointed a tribunal of inquiry consisting of at least three people, namely, a chairperson and two members, who, while they need not be judges themselves, must hold or have held high judicial office. The tribunal reported on the facts of the matter to the President and advised him as to whether the judge ought to be removed; their recommendations were consistently followed. In other words, the true power of removal lay with the tribunal, not with the President.

28. As to legal representation in cases of capital punishment, he considered that, given that lawyering was a profession, with a binding oath, paying lawyers higher fees would not necessarily lead them to perform better. Engaging outside advocates was a costly matter, and it was doubtful that they would even be willing to accept a case on the basis of what the Government was able to pay. He looked forward to the results of the study on legal aid, which would indicate the appropriate line of action not only in cases of capital offences, but also in those involving indigent persons.

29. As far as the customary courts were concerned, in his experience in attending and presiding over customary courts, he did not recall an instance in which an individual had been placed at a disadvantage merely because his case was heard in a customary court. Conducting proceedings in a customary court simply meant that accused persons were tried on the basis of customary law. Everyone who attended the hearing acted as a lawyer of sorts, putting questions to or challenging the various witnesses. Therefore, no actual lawyers were needed. There were, of course, some elementary rules, such as the right of the accused to speak in his own defence or the right to summon and cross-examine witnesses. Customary courts should in no way be likened to "kangaroo courts", although it was desirable to continue improving their procedure.

30. On the subject of the press and radio, he said licences could be freely applied for under the law; however, there were few people in Botswana who wished to invest in the media. One radio station had been allowed to have nationwide coverage, and a recent development permitted communities to apply for and operate their own radio stations. The possibility that programmes might be broadcast in ethnic languages had initially given rise to some concern, but it had later been decided that such a situation would not pose a problem. As to television, one State-owned station existed. One other station had been licensed but had failed to start up. Anyone wishing to operate a television station was free to apply for a licence.

31. On the issue of the use of abusive, obscene or insulting language in relation to the President or any public official (report, para. 359), he recalled at least two cases in which a charge had been brought under the Penal Code for abuse directed against the President. However, abuse should not be confused with lack of manners. As Attorney-General, he had dealt with cases in which he had decided not to prosecute individuals under the relevant provision because he had not believed that the type of language they had used was proscribed. Statistical data would be provided at a later stage.

32. Regarding the Marriage Act, although some ethnic groups still practised the custom whereby men choose young girls as their future wives, not only was the custom losing popularity, but the girls, once they became women, were not prohibited from marrying someone else. However, he took note of the Committee's views regarding the enforcement of the minimum legal age for marriage and agreed that it was not desirable to have customary laws that functioned outside the framework of the Covenant.

33. There were currently not more than 13 political parties in Botswana. The exact number would be confirmed on the basis of information from the registrar, who registered parties when they applied with a minimum number of members. Funding often came from party members' friends and family, or from dues upon joining the party. The situation regarding corruption was unclear, but there had been an instance where a large donation that ought to have been shared among the various opposition parties during the recent election campaign had been kept for himself by the leader of one of the parties.

34. The majority of women continued to vote for men, although that was changing rapidly as women increasingly sought to participate in the political process. The idea of setting aside a number of seats for women was not viewed as an attractive option, as the seats would not be gained in fair competition. There were few women on the bench: three besides the Attorney-General, including in the industrial court, which had similar ranking to the High Court. An ever-growing number of women were studying law and the number of female judges was thus bound to increase in the future.

35. On the issue of disaggregation of statistical data by tribe, Botswana was reluctant to identify individuals by tribal origin; instead, everyone must be regarded as Botswanan. The collection and reporting of tribally based statistics could lead to ethnic tensions. In striving to build a nation, it was essential to maintain unity, although of course the existence of tribes could not be disregarded.

36. On the issue of providing water to the Basarwa people in the Central Kalahari Game Reserve, he

reiterated that the High Court had not contested the Government's right to terminate services in the Reserve. In fact, even reports by Survival International had indicated that the Government did not have an obligation in that respect; the argument addressed before the Court had been the sheer expense of providing such services. The alternative of relocation did exist. He doubted whether the Basarwa had enough money to drill boreholes, but if they wished to, they simply had to ask for permission, like anyone else, in which case they would first have to be allocated a piece of land. Some organizations had initially indicated that they would be willing to help the Basarwa to transport water into the Reserve; however, he suspected that the offer had been made in the hope of creating a confrontation by provoking a Government refusal. In fact, the Government had not prohibited such transportation, and the organizations concerned had not followed through on their offer. He had no information about the fact-finding mission referred to in Mr. Iwasawa's question. The Government was concerned to arrive at a lasting solution by means of negotiations.

37. His reading of amended section 14 (3) (c) of the Constitution was that it prevented non-Basarwa from freely entering the Reserve, but did not stop the Basarwa people from going in or out. However, since it was a game reserve, access by non-Basarwa was restricted by the laws governing game reserves. As far as the living conditions of the Basarwa were concerned, it was important to note that the local governments carried out regular assessments to determine which individuals could feed and clothe themselves and which could not. Those who could not were entitled to clothing and food rations. Such rations were not taken into the Reserve; however, if Basarwa living in the Reserve went to neighbouring communities to be assessed, as they sometimes did, they were eligible to receive such rations. In sum, it was unclear whether it was better for the Basarwa to remain inside the Reserve or to be relocated outside it. His view was that they were better off outside because of easier access to schools, clinics and basic food. Due to cost involved, it was extremely difficult to educate dispersed populations.

38. Efforts to determine the number of tribes in Botswana had failed, as they and their subdivisions were too numerous to count. Furthermore, the data produced during the colonial period had merely reflected the colonial authorities' own concept of tribes. Currently, members of tribes were settled in areas thousands of kilometres from their ancestral lands for various economic reasons. In an effort to avoid identifying areas with any single tribe the Government had decided to rename them in a neutral manner. However, the decision had provoked such an outcry that it had been forced to defer any action. Nevertheless, Botswana was making progress towards becoming a republic. In future, a chief would not have the traditional powers currently associated with chieftainship, as those powers would be governed by statute.

39. When the Bogosi Bill had been given its first reading in Parliament and sent to the House of Chiefs, the chiefs had been granted a 30-day period to consult with their people. In his constituency, he had participated in local public assemblies to explain the Bill. It was not clear how many other Government officials had done likewise. Nevertheless, chiefs throughout the country had engaged in discussions of the Bill and proposed amendments which the Government had accepted.

40. Concerning the Land Board secretaries, they were civil servants who were assigned to areas without regard for their ethnicity or tribe. Vacancies for such posts were filled on the basis of the candidates' qualifications alone. With respect to the figure of 9 out of 12 secretaries of Tswana origin which had been cited, the identity and motives of those who had been looking into the secretaries' ethnic backgrounds were unclear. The assertion that non-Tswana songs were not played on the radio was untrue, as anyone who had ever listened to Botswana radio stations could attest. He had heard songs on the radio in many different languages, including his own. There were no restrictions on the use of minority languages in Botswana. Furthermore, there had been an increasing awareness of the need for public servants to learn some of the country's many languages other than English. The alleged suspect deaths of the Wayeyi chiefs referred to earlier involved nothing other than calls for post-mortems to determine whether there had been foul play. There had been no obstacles to conducting them. Any allegation of Government involvement in the deaths was groundless.

41. The tribunal referred to in paragraph 310 was composed of three persons holding or having held high judicial office. The tribunal advised the President on

whether judges should be removed. Concerning assistance to criminal defendants who could not afford a lawyer, *pro deo* counsel was provided in certain cases before the High Court. However, there was no such assistance in the Magistrate Courts. Regrettably, a person who owned a goat would not be able to qualify for Government assistance even though the income from it would not cover legal fees. Nevertheless, the Registrar of the High Court was empowered to provide assistance to persons who could not afford counsel when it was considered that the case should be heard in the courts.

42. Turning to the death penalty, he failed to see why the Government should be expected to feed a prisoner serving a life sentence when the person in question had engaged in skinning others alive or removing body parts. Such persons deserved to be executed. Nevertheless, he was open to continued discussion on the matter. While there were no Government campaigns to raise awareness among the tribal chiefs about the relevant provisions of the Covenant, the cases tried by them did not involve the death penalty. Some of the chiefs believed that the death penalty should not be abolished while others considered that it should apply to even lesser offences than was currently the case, a position with which he took issue.

43. Regarding the norms governing the House of Chiefs, under the Constitution, the House was entitled to discuss any matter which Parliament could take up and served as adviser to Parliament. House resolutions, however, were not binding on Parliament. With respect to the customary courts, some disputes were settled by chiefs, while others were taken up by courts which provided a written record of proceedings for the Customary Court of Appeal. Such courts of record were required to show that the accused had been informed of his rights, including the right of appeal. No attorneys were allowed in customary courts, because they tended to complicate cases excessively by raising technical issues. In his customary court, for example, he had no time for technicalities. Customary courts dealt directly with the matters at hand. Furthermore, lawyers were normally not well versed in customary law.

44. He failed to understand why non-parties to the court proceedings leading to the order allowing Basarwa tribesmen to return to land in the Central Kalahari Game Reserve should share in its benefits and wondered if they should also have shared the costs if the case had been lost. He recalled that boreholes were Government-owned.

45. Lastly, his Government had introduced legislation which addressed the question raised concerning the right of domicile in cases of divorce. Under the legislation, men and women had the same right to their own domicile. He would provide a copy of the bill to the Committee.

46. **Ms. Motoc** said she would like more information on the Government's efforts to raise awareness among the Botswana people of the need to reconcile the principles of customary law with the principles enshrined in the Covenant.

47. **Ms. Wedgwood** said that persons who were not party to a trial should be given the benefit of a court ruling if it clarified the law. The Government was a unique litigant and had the obligation to follow the law. With respect to boreholes, although they were Government-owned, the Government could be generous in the way in which it made then available to indigenous people if it wished.

48. **Mr. Iwasawa** noted paragraph 291 of the report which cited the view of a human rights group that the decision to terminate basic services to the residents inside the Central Kalahari Game Reserve was wrongful. He would like to know whether the residents who were currently allowed to bring in unlimited amounts of water had the financial means to do so.

49. **Ms. Palm**, said that she looked forward to receiving case law relating to sections 90 to 93 of the Penal Code and would appreciate statistical data on the number of persons punished under those provisions and the penalties incurred.

50. **Sir Nigel Rodley** said that he hoped that the Committee would receive details of the facts of the 40 cases where people had been executed. In particular, he would be interested to know what proportion had involved people who had skinned others alive.

51. **The Chairperson** said that the dialogue between the Committee and the delegation had been particularly important, relating as it had to an initial report. The Committee recognized the challenges facing such a culturally diverse country as Botswana in harmonizing the principles of its customary institutions with the Covenant. However, it had expressed serious concerns over the compatibility between some actions of the tribal chiefs and customary courts and the clear

provisions of the Covenant. It was therefore important for the Government to continue to supply information to the Committee on its implementation of the Covenant and to raise awareness of its provisions among the relevant authorities. The Committee had also attached importance to the establishment of national institutions for the promotion and protection of human rights.

52. Gender discrimination was also a cause for concern. The Government must continue its efforts to ensure equality between men and women in areas such as the minimum age for marriage. The criminalization of same-sex sexual activity was another area of concern, as it was contrary to the Covenant and the jurisprudence of the Committee. The Committee had also expressed very serious concerns about the provisions regarding the death penalty. He wondered whether there were crimes subject to capital punishment other than the ones cited by the delegation. Committee members had stressed the need to take account of possible mitigating circumstances as an argument against the imposition of mandatory death sentences.

53. The Committee had also expressed concern over the lack of statistical data which would make it possible to quantify and assess the scope of human rights problems. Human rights protection was not limited to legislation; it also involved studying the realities of the country.

54. The issue of building new prisons and introducing policies for the rehabilitation of prisoners had also been raised. The failure to hand the bodies of executed persons over to their families seemed to constitute inhuman and degrading treatment for the family members concerned. He reiterated the Committee's desire to continue its dialogue with Botswana, which had the necessary means, institutions and stability to bring its legislation into line with the provisions of the Covenant.

The meeting rose at 1.05 p.m.